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90-1306

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

KING ISLAND NATIVE COMMUNITY,

PETITIONER,

V.

STATE OF MONTANA

DEPARTMENT OF FAMILY SERVICES,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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February, 1991

QUESTIONS PRESENTED

1. May a state court use a best interest of the child test to deny a transfer of jurisdiction to an Alaska Native Village under the Indian Child Welfare Act, 25 U.S.C. §1911(b)?

2. May state procedure be used to deny a tribe rights granted under the Indian Child Welfare Act, 25 U.S.C. §1901 et seq.?

a. Does a state court "put the cart before the horse" by examining the merits of a particular placement for a Native child prior to ruling on a request to transfer jurisdiction to the child's tribe?

b. May a state court deny a tribe's request for a transfer of jurisdiction based on facts that arose after the tribe requested the transfer of jurisdiction?

PARTIES

The parties to the proceedings below were: Petitioner King Island Native Community, Respondent State of Montana Department of Family Services, Elizabeth M. natural mother of Teresa S., and Bradley Parrish, Esq. guardian ad litem of Teresa S.

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IN THE
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No. _____

KING ISLAND NATIVE COMMUNITY,
PETITIONER,

V.

STATE OF MONTANA
DEPARTMENT OF FAMILY SERVICES,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

The King Island Native Community respectfully petitions this Court for a writ of certiorari to review the judgment of the Montana Supreme Court in *In the Matter of T.S.*, Case No. 90-057, (Montana Supreme Court, November 20, 1990).

OPINIONS BELOW

The decision of the Montana Supreme Court is reported at ____ Mont. ____, 801 P.2d 77 (1990) and a copy is provided in the Appendix starting at page A1. The decision modified the decision of the

Montana Supreme Court entered October 11, 1990. A copy of the October 11, 1990 decision is provided in the Appendix starting at page A17. The decision of the trial court is unpublished, but a copy is provided in the Appendix starting at page A28.

JURISDICTION

The decision of the Montana Supreme Court was entered on November 20, 1990, denying the Petitioner's request for a rehearing and modifying the court's opinion of October 11, 1990. This Court has jurisdiction to review this matter pursuant to 28 U.S.C. § 1257.

STATUTES INVOLVED

This case involves provisions of the Indian Child Welfare Act, 92 Stat. 3071, now codified at 25 U.S.C. § 1901 et seq., (hereafter ICWA or the Act.) which provide for the transfer of jurisdiction of an Indian child custody case to the Indian child's tribe. The pertinent portion of the Act, 25 U.S.C. § 1911(b), provides:

In any State court proceeding

> for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

Other cited portions of the Act are set out in the Appendix (A44- A52).

STATEMENT OF THE CASE

This is an Indian Child Welfare Act (ICWA) case. The action below seeks to terminate the parental rights of an Eskimo mother to her Eskimo child. The mother, Elizabeth M., is a member of the King Island Native Community (the Tribe) and her daughter, Teresa S. is eligible for enrollment in the Tribe (App. at A36). The mother and child lived in a Native section of Anchorage, Alaska until the

summer of 1988 when they moved to Montana. They had been in Montana approximately one month when this action was initiated by the State of Montana Department of Family Services in the Tenth Judicial District Court, Fergus County on September 2, 1988 (App. at A33, Item 1). Shortly after this action was started the mother returned to Alaska (App. at A3). Petitioner Tribe was not served with process or given other notice of the proceeding. The trial court docket (App. at A32-A36) does not reflect service on the Tribe. The Tribe learned of the proceeding when informed by the mother in November 1988 after she returned to Alaska. The tribe initially intervened orally by telephoning and requesting that the child be placed in Alaska[1] (App. at A38). On December 27, 1988, the tribe intervened in writing (App. at A3). Two days later the state filed a petition seeking to terminate the mother's parental rights. The Tribe made informal efforts to have the child placed in Alaska pursuant to the Interstate Compact on Juveniles (App. at A39). *See* 42 U.S.C. § 673a; Mont. Code Ann. § 41-4-101. On February 21, 1989, when those efforts appeared

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[1]The Guidelines to the Act allow for oral intervention. Guideline C.1, 44 Fed. Reg. 67590 (1979).

fruitless, the Tribe moved the trial court to transfer jurisdiction to the tribe pursuant to the Indian Child Welfare Act, 25 U.S.C. §1911(b). The state contested the transfer of jurisdiction. The month after the Tribe requested a transfer of jurisdiction, the state placed Teresa S. in a pre-adoptive home in Lewistown, Montana (App. at A40). The proposed adoptive mother is part Indian but is not from the child's tribe nor another Eskimo tribe; the proposed adoptive father is non-Indian. They do not live in an Indian community. The State did not consult with the Tribe to find a foster family from the Tribe. *See* 25 U.S.C. §1915.

At the hearing on the motion to transfer jurisdiction, the state argued that the child had bonded with the proposed adoptive parents and that the transfer would not be in the child's best interest[2]. When no ruling had been made on the Tribe's motion by December 1, 1988, 13 months from the first telephonic request, the petitioner sought an extraordinary writ from the Montana Supreme Court to

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[2]The guardian ad litem urged the trial court not to follow *Mississippi Band of Choctaw Indians v. Holyfield, 490* U.S. 30 (1989), terming the decision "grotesque". (App. at A41, A44).

compel a ruling on the motion (App. at A35, Item 23 1/2). The trial court then denied the motion to transfer jurisdiction primarily on the grounds that the child was, by the time of the trial court's decision, "adapted to her home now, and the [foster] family desires to adopt her as soon as possible." (App. at A31) The trial court also cited as grounds for denial the court's perceived difficulty of presenting witnesses and evidence in the tribal court.

The Montana Supreme Court dismissed the petition for the extraordinary writ as moot after learning of the trial court's decision. The Petitioner made a timely motion in the trial court to reconsider the refusal to transfer jurisdiction. This motion was denied on January 9, 1990. An appeal was then taken to the Montana Supreme Court which affirmed the decision of the trial court.

FEDERAL QUESTION RAISED

Petitioner raised the federal question in the trial court on February 21, 1989 by petitioning the trial court to transfer jurisdiction of the action to the tribal court (App. at A34, Item 11). This was also an issue raised in the appeal of

the case to the Montana Supreme Court. (App. at A2).

REASONS FOR GRANTING CERTIORARI

I. The Decision Below Conflicts With the Recent Decision of this Court in *Holyfield* as well as Other Decisions of This Court in the Area of Indian Law.

In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), this Court stated that in determining jurisdiction in Indian Child Welfare Act cases courts are "to decide the legal question of *who* should make the custody determination concerning these [Indian] children - not what the outcome of that determination should be." *490 U.S.* at 53. (Emphasis in original). In contrast, in the decision below the Montana court held: "In Indian child cases such as this, the first step is to determine the § 1911(b) jurisdiction issue by applying a 'best interest of the child' test ..." (App at A8). These decisions cannot be reconciled.

In *Holyfield*, this Court took the opportunity to explore the overall parameters of the ICWA. Although *Holyfield* turned on an interpretation of the exclusive jurisdiction provision of the Act,

section 1911(a), the case was equally instructive regarding a proper interpretation and application of section 1911(b), the transfer of jurisdiction provision at issue in the present case. When referring to that provision, this Court noted that "Section 1911(b) ... creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation ..." *490 U.S.* at 36. The Montana court erred in dismissing *Holyfield* out of hand as having no application outside a section 1911(a) situation. (App. at A13).

The use of a best interest of the child test for making transfer determinations ignores two of the central themes and key admonitions given by this Court in *Holyfield*: (1) Jurisdiction cannot be determined by looking to the merits of a particular placement. *490 U.S.* at 53-54. Thus, factual determinations which prejudge the merits (an inherent and unavoidable result of using a best interests of child analysis), are unacceptable. (2) State law or practice which tends to undermine the ICWA's purposes can not be taken to express Congress's intent. 490 U.S. at 51 n.26; H.R. Rep. No. 1386, 95th Cong., 2nd Sess., 17-18 (1978).

The ICWA is remedial in nature, curtailing state authority regarding Indian

child placements, and in most cases putting that authority where it properly belongs - with Indian tribes. *Holyfield, 490 U.S.* at 45 n.17. Rather than following the presumption in favor of tribal jurisdiction, the Montana court determined that state courts have flexibility in section 1911(b) cases since the Act included a "good cause" exception, and because the BIA Guidelines are non-binding. Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979). Such an analysis is flawed for numerous reasons.

First and foremost, state court "flexibility" is just the opposite of the uniformity Congress intended.

> Indeed, the Congressional findings that are a part of the statute demonstrate that Congress perceived the states and their courts as partly responsible for the problem it intended to correct. *See* 25 U.S.C. § 1901(5) (state "judicial bodies ... have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families"). **Under these circumstances it is most improbable that Congress would have intended to**

> **leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law.**

490 U.S. at 45 (emphasis supplied) (footnote omitted).

Second, the best interest of the child test focuses solely on the child; it does not consider the tribe's interest in its children, the tribe's most valuable resource. 25 U.S.C. § 1901(3). This interest was recognized at least twice in *Holyfield*. 490 U.S. at 49, 54. The "flexibility" Montana seeks is the right to apply a test not found in the Act[3] to the exclusion of interests the Act seeks to protect.

Additionally, the use of Montana's "jurisdictional best interest of the child" test at this stage of the proceedings totally blurs the purpose of a jurisdictional hearing. The inevitable result will be precisely what happened in this

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[3]The Act does not allow a state to terminate parental rights on a best interest of the child test, 25 U.S.C. §1912(f), nor do the Guidelines list a best interest of the child test as "good cause" not to transfer jurisdiction. Guideline C.3

case - the courts will examine and apply disposition or placement factors to decide the jurisdictional issue. The mere use of a best interest test allows a state to impose non-Indian values in determining jurisdiction. "Moreover, judges too may find it difficult utilizing a vague standard like 'the best interest of the child,' to avoid decisions resting on subjective standards." *Smith v. Offer, 431 U.S. 820, 835 n.36 (1977).*

The use of the best interest test was particularly egregious in the present case in that the Court virtually granted an adoption to the child's foster parents (App. at A31) without ever requiring the showing mandated by the Act and state law to terminate parental rights. 25 U.S.C. § 1912(f); Mont. Code Ann. § 41-3-609.

In addition to conflicting with the *Holyfield* decision, the Montana court's decision also conflicts with other decisions of this Court. The opinion below necessarily assumes that the tribal court either is not competent to decide the case, or is unwilling to act in the child's best interests, or both. Such a determination runs directly contrary to well settled law and policy which specifically recognize the competency of tribal courts and tribal institutions. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, at

65-66, (1978); *see also, Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987); *Fisher v. District Court*, 424 U.S. 382 (1976). If the state recognized and respected the competency of the tribal court, it would not have to refuse transfer of jurisdiction to protect what it perceives as the best interests of the Native child.

Similarly, the tribal court is in the best position to know its ability to deal with problems that may arise from having witnesses located in Montana. The tribe can take testimony by deposition or by telephone. If the tribe determined it would be more convenient to have the case heard in Montana, it could send a tribal judge to Montana, or could appoint a judge from a local tribe or a resident Indian lawyer to act as a special master to take testimony and make findings after hearing the matter in Montana. *See* Guidelines at C.3, Commentary.

The decision of the Montana court assumes that the tribe would be unable to overcome whatever difficulties might be presented by distant witnesses, once again implying that the tribal court is not competent to deal with such problems. The perceived competency of the tribal court is not a factor to be considered by state courts. Guidelines at C.3(c). *See also*

LaPlante, 480 U.S. at 19.

No matter how a state tries to carve out or create a special "jurisdictional" best interest of the child test, as Montana has now done, the use of such a test unavoidably reaches directly into the forbidden inquiry regarding outcome, or placement of the Native child.

II. The Decision Below Directly Contravenes Important Federal Interest Regarding the Establishment and Implementation of Federal Indian Policy.

The ICWA is an exercise of federal plenary authority to define the jurisdictional boundaries between two members of our federal system: states and tribes. The power of Congress to legislate in the area of Indian Affairs is plenary. *Santa Clara Pueblo v. Martinez* 436 U.S. 49 (1978); *Talton v. Mayes* 163 U.S. 376 (1896). And the power to define the relation between the tribes and states is exclusive. *Kennerly v. District Court*, 400 U.S. 423 (1971). By establishing its own best interest of the child test for determining when to allow tribal jurisdiction, the Montana Court has shifted the jurisdictional boundary that Congress established in the ICWA.

The decision below, allowing the bonding between a Native child and foster parents to be used as good cause not to transfer jurisdiction to the tribe, effectively makes state compliance with section 1911(b) discretionary. If state social service personnel do not wish to apply the federal law, they need only seek to delay a ruling on a request for transfer of jurisdiction until the Native child is integrated into the foster family. Under the Montana Court's ruling, if a decision on the jurisdictional issue is delayed, and the child becomes established in a given placement, this delay, whether intentional or the result of institutional failure, then becomes good cause not to transfer.[4]

This puts the power to evade the federal law in the hands of state officials or other parties who, by merely

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[4]This standard is apparently different from that applied by Montana in non-ICWA cases. Montana does not allow delay or the child's incorporation into a foster home to be considered by a trial court in determining a non-ICWA child neglect case. *In the Matter of Fish*, 174 Mont. 201, 208, 569 P.2d 924, 928 (1977). "A child cannot be adversely possessed as can a piece of real property."

protracting the litigation, can develop the good cause that did not previously exist. The ruling invites complacency, if not outright intentional non-compliance with the letter and spirit of the Act.

The second rational of the decision below, that a transfer of jurisdiction would work a hardship on witnesses, is similarly flawed. If a trial court cannot, or does not, act promptly on a tribe's or parent's request to transfer, the case may develop to the point that many of the witnesses are in the state.[5] Once again state procedure, or delays in state procedure, are used to avoid federal law.

Such a situation is unacceptable, for, as this Court has stated, "The law of the United States cannot be evaded by the forms of local practice...." *American Railway Express Co. v. Levee*, 263 U.S. 19, 21 (1923). *See also Brown v. Western Ry. Co.*, 338 U.S. 294 (1949) ("Substantive rights" granted by Congress cannot be

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[5]The short period of time the mother and daughter had been in Montana when this action started does not meet the jurisdictional residency requirement for Montana's Uniform Child Custody Jurisdiction Act (UCCJA). Mont. Code Ann. § 40-7-103(5). *See also*, 28 U.S.C. §1738A(b)(4).

defeated by local practice and procedure.)

Implicit in the jurisdictional scheme established by Congress in Sections 1911(a) and 1911(b) of the ICWA, is the recognition of the Federal Government's longstanding policy of encouraging tribal self-governance and the development of tribal courts. *Williams v. Lee, 358 U.S. 217, 220 (1959); LaPlante,* 480 U.S. at 14 ("Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development.") Montana's jurisdictional best interest of the child test does considerable violence to this well established law and policy. The situation is analogous to *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), in that the "current federal policy is to promote precisely what [the state] seeks to prevent." *Id.*at 220.

III. The Decision Below is in Conflict with Decisions of Other States Which do not Allow the Best Interest of the Child to be a Factor in Determining Jurisdiction.

States are in direct conflict over the use of a best interest standard by state courts. Some states have refused to

state courts. Some states have refused to consider best interests at the time a parent or tribe requests a transfer of jurisdiction, believing that the tribal court is the appropriate forum to make that determination. *In the Matter of Armell,* 550 N.W.2d 1060 (Ill App. 1st Div.), *cert. denied,* ____U.S. ____, 111 S. Ct. 345 (1990); *In the Matter of B.W.*, 454 N.W.2d 437 (Minn. App. 1990). Such a policy allows the tribe to weigh the harm to the child of being removed from a particular placement against the harm of the child being raised in a non-tribal setting. *Armell*, 550 N.W.2d at 1066.

An Arizona court, finding both section 1911(a) and (b) applicable noted that the proper forum to determine parental fitness was the tribal court. *Matter of Appeal in Pima County Juvenile Action* 635 P.2d 187 (Ariz. App 2nd Div. 1981), *cert. denied,* 455 U.S. 1007 (1982). When it was argued that the child had been incorporated into a proposed adoptive home, the Arizona court responded:

> Any potential emotional trauma to the child if the contemplated adoption is aborted was engendered by the conduct of the adoptive parents not adhering to the mandates of the Act. **The evil which Congress sought to remedy by**

> **duct here under the guise of "the best interest of the child."**

Id. at 193 (Emphasis supplied).

The Utah Supreme Court, in what this Court has recognized as a "scholarly and sensitive opinion," *Holyfield,* 490 U.S. at 52, has rejected the notion that bonding between an Indian child and adoptive parents can be used as a basis of state court jurisdiction. *In re the Adoption of Halloway,* 732 P.2d 962 (1986). "Such a standard would reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." *Id. at 972.* Utah recognized it should "defer to the experience, wisdom and compassion " of the tribal court. *Id.*

Other states, including Montana, have found that a state court can determine the best interest of the Indian child and use that determination to deny a transfer of jurisdiction to the Indian child's tribal court. *In the Matter of M.E.M.,* 195 Mont. 329, 635 P.2d 1313 (1981); *In Re Adoption of T.R.M.,* 525 N.E.2d 298 (Ind. 1988); *Interest of J.J.,* 454 N.W.2d 317 (S.D. 1990); *In Re Robert T.,* 246 Cal. Rptr. 168, 175 (Cal. App. 6th Dist. 1988).

Petitioner believes the reasoning of these cases is flawed since it requires

the state court to determine the ultimate disposition of the case before a hearing on the merits. Petitioner questions whether a state trial court will apply the requisite standard of proof on the merits if it has, in a jurisdictional hearing, determined that the best interest of the child is served by a particular placement. In this case, the trial court found that removal of the child from the pre-adoptive home would devastate the child and that the foster parents desired to adopt Teresa as soon as possible (App at)[6]. The court made this determination before applying 25 U.S.C. § 1912 which sets the standard of proof needed to remove a child from an Indian parent and before the placement preferences of § 1915 are applied.

The ICWA is directed at state court jurisdiction over actions involving custody of Indian children. Obviously, those actions only arise in state courts. Be-

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[6] This also violates other federal policy. State courts are prohibited from making a determination of a specific placement of any child, Indian or non-Indian. Federal law requires that such determination be made by a state social service agency, 42 U.S.C. § 672 (a)(2), or tribal organization, 42 U.S.C. § 628.

cause principles of res judicata prevent review of state court actions in a federal court, *Lewis v. Kiowa Tribe* 777 F.2d 587 (8th Cir. 1985), *cert. denied*, 479 U.S. 872 (1986), the only method to obtain federal review and achieve the uniformity Congress intended, is to have those conflicts reviewed by this Court. Since this federal issue will not be heard in the federal circuits, a conflict between the states should be viewed as seriously as a conflict among the circuits.

CONCLUSION

For these reasons, the Petition for Certiorari should be granted and the matter should be set for plenary review.

Respectfully Submitted,

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February, 1991

APPENDIX

A. REVISED OPINION

NO. 90-057
IN THE SUPREME COURT OF THE
STATE OF MONTANA
1990

IN THE MATTER OF T.S.
Youth in Need of Care.

APPEAL FROM: District Court of
the Tenth Judicial District,
In and for the County of Fergus,
The Honorable Peter L. Rapkoch,
Judge presiding.

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Submitted on Briefs: August 23, 1990
Decided: November 20, 1990
Filed: November 20, 1990

Justice Fred J. Weber delivered the Opinion of the Court.

King Island Native Community, an Eskimo

tribe located in Nome, Alaska, appeals from a judgment of the District Court, Tenth Judicial District, Fergus County, denying the Tribe's motion to transfer jurisdiction of child custody proceedings of any Eskimo child un the Indian Child Welfare Act. We affirm.

The issues presented are:

1. Did the District Court err when it held that there was good cause not transfer jurisdiction of child custody proceedings to King Island Tribal Court?

2. Did the District Court err when it failed to remove the guardian ad litem from the case when the guardian ad litem expressed misgivings about the ICWA?

T.S. was born in Alaska to a mother who is part Eskimo and is eligible for membership in the King Island Native community (Tribe). Neither Mother nor T.S. is a member of the Tribe and neither have ever resided on the reservation during the lifetime T.S. The record reveals a long history of transient lifestyle which was punctuated with domestic violence and physical abuse during the marriage of Mother and Stepfather. The evidence indicated that Mother was abused by Stepfather and T.S. was abused by both Mother and Stepfather.

Mother and Stepfather were residing in Fergus County, Montana on August 31, 1988, when T.S. was placed in protective custody by the Montana Department of Family Services (Department). T.S. was three and a half years old at the time. A petition for temporary investigative authority was

filed and on December 2, 1988, the District Court appointed a guardian ad litem for T.S. and issued its order for protective services and order to show cause.

Shortly after T.S. was placed in a temporary foster home, Mother returned to Alaska. Mother contacted the Tribe and requested that the Tribe intervene in her case pursuant to the Indian Child Welfare Act (ICWA). On December 27, 1988, the Tribe filed a motion to intervene in the proceedings pursuant to 25 U.S.C. § 1911 (c) of the ICWA and intervention was granted the following day. On December 29, 1988, the Department of Family Services filed a petition for permanent legal custody of T.S. and for termination of Mother's parental rights. On February 21, 1989, the Tribe filed a motion to transfer jurisdiction to its tribal court pursuant to 25 U.S.C. §1911(b). Mother joined the transfer request on March 10, 1989. A hearing to determine the jurisdictional issue was held on July 19, 1989. The District Court denied the Tribe's best interests to transfer jurisdiction, and 2) it would constitute an undue hardship to the parties and witnesses in Montana to appear in tribal court in Alaska.

Did the District Court err when it held that there was good cause not to transfer jurisdiction of child custody proceedings to King Island Tribal Court?

Section 1911(a) and (b) of the Indian

Child Welfare Act states:

An Indian Tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, and Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of ether parent or the Indian custodian or the Indian child's tribe; **Provided**, That such transfer shall be subject to declination by the tribal court of such tribe. (Emphasis supplied.) 25 U.S.C. §1911(a), (b).

Since T.S. was not domiciled or residing within the reservation, subsection (b) applies which requires

transferring jurisdiction in the absence of good cause to the contrary. This Court has held that in cases that fall under subsection (b):

> The burden of showing "good cause to the contrary" must be carried by the State with clear and convincing evidence that the best interests of the child would be injured by such a transfer, We direct the District Court to consider the guidelines for state courts established by the Department of the Interior in its determination,
> although in addition thereto the best interest of the child could prevent transfer of jurisdiction upon a "clear and convincing" showing by the State.
> In the Matter of M.E.M Youth in Need of Care (1981), 195 Mont. 329, 336, 635 P.2d 1313, 1317.

The guidelines for state courts referred to in M.E.M. state:

> Determination of Good Cause to the Contrary
> (a) Good cease not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.
> (b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:
> (i) The proceeding was at an advanced stage when the petition to transfer was

received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian Child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little nor no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.
44 Fed.Reg. 67591 (1979)

These guidelines were drafted by the Bureau of Indian Affairs (BIA) and represent the Department of Interior's interpretation of what grounds would establish good cause. In the introduction, the Department of Interior states the guidelines are "not published as regulations because they are not intended to have binding legislative effect." 44 Fed. Reg. 67584 (1979). Courts are "free to act contrary to what the Department has said if they are convinced that the Department's guidelines

ar not required by the statute itself." Id. "Primary responsibility for interpreting..... Language used in the Act... rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." Id.

In exercising this flexibility, this Court has determined that the "best interests of the child" test will be applied in Montana in determining good cause not to transfer jurisdiction of custody proceedings of Indian children under § 1911(b). M.E.M. at 336, 635 P.2d at 1317. This "best interests of the child" test applied under § 40-4-212, MCA, in custody determinations between parents in a dissolution. It should also not be confused with the criteria used to determine child abuse, neglect, and dependency and to terminate parent - child legal relationships under Title 41, Chapter 3, MCA.

In Indian child case such as this, the first step is to determine the § 19111 (b) jurisdiction issue by applying the "best interests of the child" test and considering the BIA Guidelines to determine good cause. M.E.M. at 336, 635 P.2d at 1317. The next step is to hold a temporary dispositional hearing under § 41-3-404, MCA, to represent the child's interests. The final step under Title 41,

Chapter 3, is for the court to determine whether the parent-child legal relationship should be terminated under the criteria listed in § 41-3-609, MCA. This stage of the proceedings also requires the appointment under § 41-3-607(3), MCA, of a guardian ad litem to represent the child's best interests.

In this case the proceedings are still at the jurisdictional level and the District Court properly applied the jurisdictional "best interests of the child" test and considered the BIA Guidelines.

The uncontroverted evidence at the hearing in this case strongly indicates that any transfer of T.S. from her present environment would "devastate" the child and would have long-term harmful effects upon her. This is the longest, most stable and protected environment she has ever known. The District Court properly considered the only loving environment T.S. has ever known in its application of the best interests test. She resides in a home the mother in Native American and fully capable and willing to teach T.S. about her Indian heritage. T.S. has adapted to her home and the family desires to adopt her as soon as possible.

The Tribe argues that there is a profound difference between the culture of the Eskimo and the Indian culture of the foster mother and that difference makes it in T.S.'s best interests that jurisdiction be transferred. In essence the tribe argues that § 1915 of the ICWA presumes

that it is in the best interests of T.S. that jurisdiction be transferred. 25 U.S.C.§§ 1915, 1303 (1) (iii), (iv). Section 1915(b) suggests preferential foster care placement of an Indian child. That section states:

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with--

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) and Indian foster home licensing authority; or

(iv) and institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

In this case T.S.'s maternal grandmother is unable to provide a home for T.S. and there are no other available family members known to the court. The Department of Family services has made a good faith attempt to comply with the

recommended preferential treatment by placing T.S. in a foster home within reasonable proximity to the child's home in Fergus County and with an Indian foster mother who is fully capable and willing to teach T.S. about her Indian heritage. This Court notes that at the time of the placement, Fergus County was the child's home. Mother did not move to Alaska until after the child was placed in the temporary foster home pending temporary investigative authority and protective proceedings under § 41-3-402, MCA. The Tribe has not had contact with T.S. and has never shown any interest or concern for the living conditions that T.S. has been subjected to. The Tribe insists that it has had contact with T.S. and her Mother and also insists it has not intervened in T.S.'s behalf because it did not know of T.S.'s plight. The Tribe cannot have it both ways. There was no evidence in the record to indicated the Tribe has had any contact with T.S. or her Mother until it received notice of the pending matter in Montana courts. The District Court pointed out:

. . . it is obvious from testimony adduced at the hearing and the record that the Tribe showed little or no interest in [T.S] and [her mother] prior to this action being filed. There is a long and sad history of abuse and neglect of [T.S] in the State of Alaska. There was also Social Service involvement with this family in Alaska with no intervention or

help for [T.S] by the Tribe.

The District Court correctly concluded that it was not in the child's best t interest to remove her from the only stable, loving home she had known and send her to an isolated community with which she had never had previous contact. The Tribe claims there has been an intentional delay resulting in a greater period in which bonding has occurred in the foster home, thus suggesting that the failure to immediately transfer jurisdiction has been improper. The record does not demonstrate any intentional delay. The record does demonstrate careful examination by both the Department and the District Court and a vital and proper concern for this Indian child who has been abused the greater part of her life. While it is true that Mother has joined the Tribe's request for transfer, the evidence unfortunately shows Mother to be unable to adequately protect and care for this child. We note that the Tribe submitted not factual basis to allow the District Court to find under the BIA Guidelines or under the best interests of the child test other than that it is in the child's best interests that jurisdiction remain in Montana. We detect nothing in the proceedings to indicate animosity or lack or respect for the Tribe. Concern for the best interests of the child has been the motivating force for both the Department and the District Court.

Under the Guideline the District Court

determined that subsection (b) (iii) applies, which states that good cause not to transfer exists if the evidence necessary to decide the case could not be adequately presented to the court without undue hardship to the parties or the witnesses. 44 Fed.Reg 67591 (1979). The witnesses and evidence upon which the Department of Family Services' action was filed are all located in Montana. The District Court concluded that it would constitute an undue hardship if the parties and witnesses were required to travel from Montana in order to appear in Tribal Court in Alaska. We conclude there is substantial evidence to support that conclusion.

The Tribe argues that the court has over looked the recommendation of the Department's Indian Child Welfare Specialist concerning transfer of jurisdiction. The Specialist's testimony was not presented at the jurisdictional hearing. The Tribe attempted to bring in the Specialist's recommendation through a post-hearing motion to reconsider on grounds of new evidence. No evidence was presented in the subsequent hearing on the motion to reconsider to show that the Specialist's testimony was unavailable at the time of the jurisdictional hearing, and therefore the evidence is snot properly before the Court. In addition, cross examination of the Specialist at the hearing on the motion for rehearing, revealed that the Specialist had reviewed some unidentified file material but not he

entire file or the transcript of the jurisdictional hearing. No evidence indicated the Specialist had interviewed T.S., her mother, or the foster parents. Without a proper foundation to support the Specialist's recommendation, the court would have properly not considered the Specialist's recommendation when applying the best interests of the child test had the evidence been properly before the court. The court correctly denied the motion for reconsideration and properly disregarded the Specialist's recommendation.

The Tribe argues that a 1989 United States Supreme Court ruling mandates transfer of jurisdiction. Mississippi Bank of Choctaw Indians v. Holyfield , No. 87-980, slip op. (U.S. Sup.Ct., Apr.3, 1989.) Holyfield was a § 1911(a) and Holyfield do not control. There is a valid distinction between a § 1911(b) case such as we have here and a §1911(a) case such as Holyfield. When the child has been domiciled on the reservation and has significant contacts with the Tribe it is reasonable to assume that jurisdiction should be transferred to the Tribe. In this case we have the opposite circumstances which § 1911(b) is meant to address. T.S. has never lived on the reservation, is not a member of the Tribe and has never had any contact whatsoever with the Tribe. The record demonstrates a total absence of evidence demonstrating that it is in T.S.'s best interests that jurisdiction be transferred to the Tribe.

We hold that the District Court did not err in determining that the best interests of T.S. and undue hardship on parties and witnesses constitutes good cause not to transfer jurisdiction.

II

Did the District Court err when it failed to remove the guardian ad litem from the case when the guardian ad litem express misgivings about the ICWA?

The Tribe did not request the removal of the guardian ad litem and may not now predicate error on the District Court's failure to take such action. In addition, the District Court admonished the guardian ad litem that his thoughts on the ICWA were irrelevant and would be treated as such by the court. We hold the District Court did not err by failing to remove guardian ad litem.

Affirmed.

/s/ Fred J. Weber
Justice

We concur:

/s/ J.A. Turnage
Chief Justice

/s/ Diane G. Barz

/s/ John Conway Harrison

/s/ William E. Hunt

/s/ R.C. Mcdonough

Justice John C. Sheehy, dissenting:

It is improper and somewhat patronizing to assume that since the child is now placed with an Indian mother, though of a different tribe and territory, that the purpose of the Indian Child Welfare Act is fulfilled, and good cause shown for not assenting to the jurisdiction of the Eskimo tribe.

The very purpose of the Indian Child Welfare Act was to enable the several tribes to maintain their individuality and their cultures in a mobile and fast-changing national society. I daresay without investigation that the culture, mores, religious beliefs and mode of life is substantially different between the Eskimo tribe of the King Island Native Community and the Plains Indian Tribe to which the foster mother presumably belongs. The majority has determined "best interest" of the child lacking even a smidgeon of information of what the King Island Native Community has to offer. I would hold that the Eskimo tribe has a right to reach out and touch us where eligible members of the Eskimo tribe are concerned. One thing is certain: the culture of the Eskimos will not be preserved or prolonged in Montana. I believe you have to start with whale and seal meat, and the derivatives of these creatures, that made Eskimo life uniquely possible.

I would cede jurisdiction to the Eskimo tribe.

/s/ John C. Sheehy

B. ORDER DENYING REHEARING

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 90-057

IN THE MATTER OF T.S.)
) ORDER
A Youth in need of care.)

Appellant King Island Native Community has filed a petition for rehearing and respondent State of Montana has filed their response. Following our consideration of the same, we have concluded that it is advisable to revise our original opinion shown to have been decided on October 15, 1990.

IT IS ORDERED that the original opinion in this cause shown to have been submitted on briefs on August 23, 1990 and decided on October 15, 1990 is hereby withdrawn. In place of that opinion we have issued a replacement opinion which is shown to have been submitted on briefs on August 23, 1990 and decided on November 20, 1990.

The petition for rehearing is denied.

DATED this 20th day of November, 1990.

_____

CHIEF JUSTICE

C. ORIGINAL OPINION

NO. 90-057

IN THE SUPREME COURT OF THE
STATE OF MONTANA
1990

IN THE MATTER OF T.S.
Youth in Need of Care.

APPEAL FROM: District Court of
the Tenth Judicial District,
In and for the County of Fergus,
The Honorable Peter L. Rapkoch,
Judge presiding.

COUNSEL OF RECORD:

For Appellant:
Daniel Duame; Kawerak, Inc.,
Nome, Alaska.
D. Michael Eakin; Montana Legal
Services Assn.; Billings, Montana

For Respondent:
Bradley B. Parrish; Lewistown,
Montana, Guardian ad litem
Marc Raciot; Attorney General,
Helena, Montana
Clay R. Smith; Asst. Attorney
General, Helena, Montana
Jon A. Oldenberg; Lewistown,
Montana

Submitted on Briefs: August 23, 1990
Decided: October 15, 1990

Justice Fred J. Weber delivered the Opinion of the Court.

King Island Native Community, an Eskimo

tribe located in Nome, Alaska, appeals from a judgment of the District Court, Tenth Judicial District, Fergus County, denying the Tribe's motion to transfer jurisdiction of child custody proceedings of any Eskimo child un the Indian Child Welfare Act. We affirm.

The issues presented are:

1. Did the District Court err when it held that there was good cause not transfer jurisdiction of child custody proceedings to King Island Tribal Court?

2. Did the District Court err when it failed to remove the guardian ad litem from the case when the guardian ad litem expressed misgivings about the ICWA?

T.S. was born in Alaska to a mother who is part Eskimo and is eligible for membership in the King Island Native community (Tribe). Neither Mother nor T.S. is a member of the Tribe and neither have ever resided on the reservation during the lifetime T.S. The record reveals a long history of transient lifestyle which was punctuated with domestic violence and physical abuse during the marriage of Mother and Stepfather. The evidence indicated that Mother was abused by Stepfather and T.S. was abused by both Mother and Stepfather.

Mother and Stepfather were residing in Fergus County, Montana on August 31, 1988, when T.S. was placed in protective custody by the Montana Department of Family Services (Department). T.S. was three and a half years old at the time. A petition for temporary investigative authority was

filed and on December 2, 1988, the District Court appointed a guardian ad litem for T.S. and issued its order for protective services and order to show cause.

Shortly after T.S. was placed in a temporary foster home, Mother returned to Alaska. Mother contacted the Tribe and requested that the Tribe intervene in her case pursuant to the Indian Child Welfare Act (ICWA). On December 27, 1988, the Tribe filed a motion to intervene in the proceedings pursuant to 25 U.S.C. § 1911 (c) of the ICWA and intervention was granted the following day. On December 29, 1988, the Department of Family Services filed a petition for permanent legal custody of T.S. and for termination of Mother's parental rights. On February 21, 1989, the Tribe filed a motion to transfer jurisdiction to its tribal court pursuant to 25 U.S.C. §1911(b). Mother joined the transfer request on March 10, 1989. A hearing to determine the jurisdictional issue was held on July 19, 1989. The District Court denied the Tribe's best interests to transfer jurisdiction, and 2) it would constitute an undue hardship to the parties and witnesses in Montana to appear in tribal court in Alaska.

Did the District Court err when it held that there was good cause not to transfer jurisdiction of child custody proceedings to King Island Tribal Court?

Section 1911(a) and (b) of the Indian

Child Welfare Act states:

An Indian Tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, and Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of ether parent or the Indian custodian or the Indian child's tribe; **Provided**, That such transfer shall be subject to declination by the tribal court of such tribe. (Emphasis supplied.) 25 U.S.C. §1911(a), (b).

Since T.S. was not domiciled or residing within the reservation, subsection (b) applies which requires

transferring jurisdiction in the absence of good cause to the contrary. This Court has held that in cases that fall under subsection (b):

The burden of showing "good cause to the contrary" must be carried by the State with clear and convincing evidence that the best interests of the child would be injured by such a transfer, We direct the District Court to consider the guidelines for state courts established by the Department of the Interior in its determination, although in addition thereto the best interest of the child could prevent transfer of jurisdiction upon a "clear and convincing" showing by the State.
In the Matter of M.E.M Youth in Need of Care (1981), 195 Mont. 329, 336, 635 P.2d 1313, 1317.

The guidelines for state courts referred to in M.E.M. state:

Determination of Good Cause to the Contrary

(a) Good cease not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was

received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian Child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little nor no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.
44 Fed.Reg. 67591 (1979)

These guidelines were drafted by the Bureau of Indian Affairs (BIA) and represent the Department of Interior's interpretation of what grounds would establish good cause. In the introduction, the Department of Interior states the guidelines are "not published as regulations because they are not intended to have binding legislative effect." 44 Fed. Reg. 67584 (1979). Courts are "free to act contrary to what the Department has said if they are convinced that the Department's guidelines

ar not required by the statute itself." Id. "Primary responsibility for interpreting..... Language used in the Act... rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." Id.

In exercising this flexibility, this Court has determined that the "best interests of the child" test will be applied in Montana in determining good cause not to transfer jurisdiction of custody proceedings of Indian children under § 1911(b). M.E.M. at 336, 635 P.2d at 1317.

The uncontroverted evidence at the hearing in this case strongly indicates that any transfer of T.S. from her present environment would "devastate" the child and would have long-term harmful effects upon her. This is the longest, most stable and protected environment she has ever known. The District Court properly considered the only loving environment T.S. has ever known in its application of the best interests test. She resides in a home the mother in Native American and fully capable and willing to teach T.S. about her Indian heritage. T.S. has adapted to her home and the family desires to adopt her as soon as possible.

The Tribe argues that there is a profound difference between the culture of

the Eskimo and the Indian culture of the foster mother and that difference makes it in T.S.'s best interests that jurisdiction be transferred. Section 1915(a) of the ICWA provides that , absent "good cause " to the contrary, adoptive placements are to be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families. 25 U.S.C. § 1915(a). In this case T.S.'s maternal grandmother is unable to provide a home for T.S. and there are no other available family members known to the court. While members of the child's tribe would normally be the next preferred placement, in this case there is "good cause" not to place T.S. with the Tribe. The Tribe has not had contact with T.S. and has never shown any interest or concern for the living conditions that T.S. has been subjected to. The Tribe insists that it has had contact with T.S. and her Mother and also insists it has not intervened in T.S.'s behalf because it did not know of T.S.'s plight. The Tribe cannot have it both ways. There was no evidence in the record to indicated the Tribe has had any contact with T.S. or her Mother until it received notice of the pending matter in Montana courts. The District Court concluded that it was not to the child's best interest to remove her from the only stable, loving home she had known and send her to an isolated community with which she had never had previous contact. The District Court concluded that the placement of T.S.

with an Indian Mother had satisfied the preferential placement requirement. We agree.

In addition to the "best interests" test, this court has directed district courts to consider the BIA guidelines to determine good cause. M.E.M. at 336, 635 P.2d at 1317. The District Court here considered the guidelines. They were helpful. However, the District Court decided this case on its own merits which is proper.

In this case the District Court considered the BIA guidelines and determined that subsection (b)(iii) applies which states that good cause not tho transfer exists if the evidence necessary to decide the case could not be adequately presented to the court without undue hardship to the parities or the witnesses. 44 Fed. Reg. 67591 (1979). The witnesses and evidence upon which the Department of Family Services action was filed are all located in Montana. The District Court concluded that it would constitute an undue hardship if the parties and witnesses were required to travel from Montana in order to appear in the Tribal Court in Alaska. We conclude there is substantial evidence to support that conclusion.

The Tribe argues that a 1989 United States Supreme Court ruling mandates transfer of jurisdiction. Mississippi Band of Choctaw Indians v. Holy field,, No. 87-980, slip op. (U.S. Sup.Ct., Apr. 3, 1989,). Holyfield was a §1911(a) case

that dealt with the definition of "domiciled". Because of T.S. had not been domiciled on the tribal reservation in Alaska, we agree with the conclusion of the District Court that § 1911(a) and Holyfield do not control.

We hold that the District Court did not err in determining that he best interests of T.S. and undue hardship on parties and witnesses constitutes good cause not to transfer jurisdiction.

II

Did the District Court err when it failed to remove the guardian ad litem from the case when the guardian ad litem express misgivings about the ICWA?

The Tribe did not request the removal of the guardian ad litem and may not now predicate error on the District Court's failure to take such action. In addition, the District Court admonished the guardian ad litem that his thoughts on the ICWA were irrelevant and would be treated as such by the court. We hold the District Court did not err by failing to remove guardian ad litem.

Affirmed.

/s/ Fred J. Weber
Justice

We concur:

/s/ J.A. Turnage
Chief Justice

/s/ Diane G. Barz

/s/ John Conway Harrison

/s/ William E. Hunt

/s/ R.C. Mcdonough

Justice John C. Sheehy, dissenting:

It is improper and somewhat patronizing to assume that since the child is now placed with an Indian mother, though of a different tribe and territory, that he purpose of the Indian Child Welfare Act is fulfilled, and good cause shown for not assenting to the jurisdiction of the Eskimo tribe.

The very purpose of the Indian Child Welfare Act was to enable the several tribes to maintain their individuality and their cultures in a mobile and fast-changing nation society. I daresay without investigation that the culture, more, religious beliefs and mode of life is substantially different between the Eskimo tribe of the King Island Native Community and the plains Indian Tribe to which the foster mother presumably belongs. The majority has determined "best interest" of the child lacking even a smidgeon of information of what the king Island Native Community has to offer. I would hold that he Eskimo tribe has a right to reach out and touch us where

eligible member of the Eskimo tribe are concerned. One thing is certain: the culture of the Eskimos will not preserved or prolonged in Montana. I believe you have to state with whale and seal meat, and the derivatives of these creatures, that made Eskimo life uniquely possible.

I would cede jurisdiction to the Eskimo tribe.

/s/ John C. Sheehy

D. TRIAL COURT OPINION

MONTANA TENTH JUDICIAL DISTRICT COURT,
FERGUS COUNTY
****

IN THE MATTER OF INQUIRY	)	
	)	
INTO T.S.	)	
	)	No.DJ 88-14
	)	
Youth In Need of Care	)	
	)	

MEMORANDUM ORDER
****

THIS MATTER came before the Court on the Motion To Transfer Jurisdiction of this matter to the King Island Native Community in Alaska. The Motion was filed by Torger S. Oaas who appeared on behalf

of the natural mother and the King Island Native Community (hereinafter Tribe) along with Daniel Duame, Attorney at Law, Nome, Alaska. Jon A. Oldenburg, Deputy Fergus County Attorney appeared on behalf of the Department of Family Services, and Bradley B. Parrish appeared as attorney and guardian ad litem for the child. There was a hearing conducted on the Motion, and the matter was thoroughly briefed and submitted to the Court.

The Tribe argues here that the Indian Child Welfare Act mandates a transfer of the jurisdiction of this case to the Tribal Court in Alaska. They have further argued that physical custody of the child, Teresa Sebwenna, should also be transferred to the Tribe. The case law in Montana, and the facts adduced at the hearing in this matter dictate otherwise.

The natural mother, Elizabeth McDonald and her husband Walter McDonald, were residing in Fergus County, Montana, on August 31, 1988, when Teresa was placed in protective custody by the Department of Family Services. A Petition for Temporary Investigative Authority was filed and on September 2, 1988, this Court issued its Order For Protective Services And Order To Show Cause. This Order was never challenged, and the jurisdiction of this Court over Teresa was not questioned until the tribe intervened in December of 1988.

The record herein reveals that although Elizabeth and Teresa are eligible for membership in the Tribe, they have never resided with the Tribe during

Teresa's life. The record reveals a long history of a transient life-style which was punctuated with domestic violence and physical abuse during the marriage of Walter and Elizabeth.

This Court recognizes the existence of the Indian Child Welfare Act and its applicability to the case at bar. That Act would in fact require the transfer of jurisdiction in this matter to the Tribe, "in the absence of good cause to the contrary." (See Section 101(b), Indian Child Welfare Act).

The Montana Supreme Court, In the Matter of M.E.M. Youth In Need of Care, (Mont. 1981) 635 P. 2d 1313, stated the rule that not only does this Court need to consider the non-binding "good cause" definition in the Federal Register, but must also consider the best interests of the child.

It is obvious from the testimony adduced at the hearing and the record herein that the Tribe showed little or no interest in Teresa and Elizabeth prior to this action being filed. There is a long and sad history of abuse and neglect of Teresa in the State of Alaska. There was also Social Service involvement with this family in Alaska with no intervention or help for Teresa by the Tribe. This creates a serious question in the mind of the Court about the motives of the Tribe in intervening at this time. On the one hand they assert that Elizabeth has maintained some kind of "contact" with the Tribe although she has never resided on

the reservation, while on the other hand admitting that they have had no knowledge (let alone contact) with this family because otherwise, they would have intervened in Teresa's behalf long ago. They can't have it both ways. And in the opinion of this Court there has never been contact of any kind between the Tribe and this family, whether it be actual physical contact or what could be deemed spiritual contact.

The Witnesses and testimony upon which the Department of Family Services action was filed here are all located in Fergus County, Montana. The evidence necessary to decide this case exists here in Fergus County, Montana, and it would constitute and undue hardship to the parties and witnesses here to appear in Tribal Court.

A further and compelling reason not to transfer jurisdiction of this case and Teresa to the Tribal Court is Teresa's best interests. Teresa has been domiciled in Montana since August of 1988. This is the longest, most stable and protected environment she has known her entire life. She now resides in a home where the mother is Native American and fully capable and willing to teach teresa about her Indian heritage. Teresa is adapted to her home now, and the family desires to adopt her as soon as possible.

The uncontroverted evidence at the hearing in this matter indicated strongly that any transfer of this child from her present environment would "devastate " the

child and would have long-term harmful effects upon her. The evidence is overwhelming that the "best interests" of Teresa will be best served by leaving jurisdiction of her and this case in this Court.

The Motion of the Tribe to transfer jurisdiction is hereby denied.

DATED THIS 4th day of December, 1989

/s/ PETER L. RAPKOCH
JUDGE OF THE DISTRICT COURT

E. TRIAL COURT DOCKET SHEET

Docket for Dependent and Neglected Children
IN THE MATTER OF INQUIRY INTO
T.S., Youth in Need of Care

Jon A. Oldenburg, Deputy County Attorney
Bradley B. Parrish Guardian ad Litem
Torger S. Oaas, Court appointed for mother
D. Michael Eakin for Montana Legal Services for King Island Native Community.

DJ-88-14

WHEN FILED	PAPERS FILED

1. SEPT.2, 1988 PETITION FOR TEMPORARY INVESTIGATIVE AUTHORITY AND PROTECTIVE SERVICES
" 2, " ORDER FOR PROTECTIVE SERVICES AND ORDER TO SHOW CAUSE SEPT.20 AT 9:30, ISSUED
" 16, " ORDER FOR PROTECTIVE SERVICES AND ORDER TO SHOW CAUSE, RETURNED
2." 20, " MINUTE ENTRY ORDER TO ISSUE
3." 22, " SERVICE TREATMENT AGREEMENT BETWEEN ELIZABETH MCDONALD AND FERGUS COUNTY DEPARTMENT OF FAMILY SERVICES
4." 28, " ORDER (COPIES GIVEN)
OCT. 7, " MINUTE ENTRY - TORGER OAAS COURT APPOINTED
5.DEC. 27, " MOTION TO INTERVENE
6. " 27, " MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE
7. " 28, " ORDER (COPIES TO COUNSEL)
8. " 29, " PETITION FOR PERMANENT LEGAL CUSTODY AND TERMINATION OF PARENTAL RIGHTS
9." 29, " NOTICE OF HEARING - FEB.7 AT 9:00
FEB. 7, 1989 MINUTE ENTRY, ORDER TO ISSUE FEB. 23, AT 9:00
10." 17, " MOTION TO REQUIRE DEPARTMENT OF FAMILY SERVICES TO FOLLOW PROVISIONS OF

			41-4-101 ET. SEQ. MCA
11."	21,	"	MOTION TO TRANSFER JUVENILE OF THIS CASE TO KING ISLAND NATIVE COMMUNITY
12. "	21,	"	BRIEF IN SUPPORT OF MOTION TO TRANSFER JURISDICTION
13."	22,	"	RESPONSE TO MOTION TO TRANSFER
"	23,	"	MINUTE ENTRY (30 DAYS GIVE TO JUDGE BRIEFS AND ANSWERS)
14.MARCH	10,	1989	MOTION AND BRIEF
15."	10,	"	BRIEF ON LAW RELATION TO INDIAN CHILD WELFARE ACT
16."	17,	"	RESPONSE BRIEF ON LAW RELATING TO INDIAN CHILD WELFARE ACT
17."	3,	"	REPLY TO RESPONSE BRIEF ON LAW RELATING TO INDIAN CHILD WELFARE ACT
JULY	11,	"	MINUTE ENTRY - HEARING JULY 19 AT 3:30
"	19,	"	MINUTE ENTRY - RESPONDENT EXHIBIT 1 ADMITTED. MATTER TAKEN UNDER ADVISEMENT
18."	26,	"	REPORT TO THE COURT BY GUARDIAN AD LITEM
18. 1/2 AUG.	2,	"	RECENT APPLICABLE LAW
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23 1/2	" 5,	"	PETITION FOR WRIT OF SUPERVISORY CONTROL
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F. AFFIDAVIT RE: MEMBERSHIP

State of Alaska)
Second judicial District)

AFFIDAVIT OF MIKE SACLAMANA

I, Mike Saclamana, being first duly sworn, hereby depose and say as follows:

1. I am a member of the King Island Native Community, and am a memberof the King Island IRA Council and Tribal Court.

2. I, and our IRA Council have been actively involved in the case of Elizabeth McDonald and her daughter Theresa (Montana District Court case No. DJ-88-14) since we first recieved notice of this case late in 1988.

3. Under our Ordinance No. 87-01, Elizabeth McDonald is considered to be a member of the King Island Native Community and her daughter is therefore eligible for membership.

5. Although Elizabeth and her family have spent the last residing in Anchorage, Alaska, the Tribe and various family members have maintained contact with the family.

5. The King Island Native Community has requested that the case referenced above be transferred to the King Island Tribal Court.

6. Under Federal law (the Indian Child Welfare Act) and the laws and

customs of the King Island Native Community our Tribal Courthas jurisdiction over both Elizabeth and Theresa and the subject matter of this case.

7. Upon an Order by the Fergus County District Court transferring this case to the King Island Tribal Court, our Tribal Court is prepared to issue an immediate Custody Order and send a tribal representative to Montana to bring Theresa back to Alaska where she will be paced in an appropriate Native foster home, pending disposition of this matter.

Dated 3/30/89 /s/ Mike Saclamana
Mike Saclamana
IRA Councilman
(Seal) Tribal Court Judge
King Island Native
Community

SUBSCRIBED AND SWORN TO before me this 30th day of March, 1988, at Nome, Alaska.

Doris E. Kalake
Notary Public for the
State of Alaska
My Commission Expires:
4/26/92

G. EXCERTS FROM THE TRANSCRIPT
IN THE SUPREME COURT OF THE
STATE OF MONTANA
1990

IN THE MATTER OF T.S. Cause No.
Youth in Need of Care. DJ-89-14

TRANSCRIPT ON APPEAL
BEFORE THE HONORABLE PETER L. RAPKOCH

JUDGE OF THE DISTRICT COURT
Wednesday, July 19, 1989
3:30 o'clock p.m.
APPEAL FROM THE DISTRICT COURT OF THE TENTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF FERGUS
REPORTED BY: AUDREY C. PETERSEN
Pages 44-45:

Q (by Mr Oaas) Prior to December of 1988, is it true that Dan Duame asked you to voluntarily turn Teresa Sebwenna over to the jurisdiction of the tribal court?

A [Jim Simonich, a socialworker for Fergus County] He said something to that effect.

Q That was sometime between August of 1988 and December of 1988?

A Probably closer to December.

Q Were you in regular contact with Dan Duame during this period of time?

A Pretty much. I made several phone calls to him.

Q He made several phone calls to you?

A Yes.

Q Appeared interested in the proceedings?

A He just wanted to know what we were doing down here.

Q Okay. At some point in time between August of '88 and December of '88 he requested that you voluntarily relinquish the child to the jurisdiction of the tribal court?

A Yes, he did.

Q You refused to do that?

A Yes, I did.

Q Why?

A It's not in the child's best interests to transfer up there.

Q At that time why was it not in the child's best interests?

A The same reasons they are now. There's no reason to transfer her to Alaska. What would be the reason to transfer up there?

Page 50:

Q Sometime between August of '88 and December of '88 did Dan Duame asked you to enter into an Interstate Compact for the placement of Teresa under the Interstate Compact under the laws of Montana?

A He brought something up about it once, if we would be willing to do something like that.

Q He asked if you would be willing to do

something like that?

A I think that was basically what he asked yeah.

Q What was your response?

A At that point in time, no.

Q Why?

A It's not in Teresa's better interests to transfer her up there.

Page 51:

Q So the transfer to the Napier didn't occur until March of 1989?

A Right.

Q That would have been after the date that the King Island Native Community intervened in this case, after February 30th, I believe, 1989, is that correct?

A Yes.

Q The placement in the Napier home, obviously, but for the record I'm going to ask, occurred after you declined to enter into an Interstate Compact involving Teresa Sebwenna with Alaska, and after you refused to voluntarily return the child to the tribe?

A It came after I refused to do that, is

that what you're saying?

Q Right.

A Yeah. Datewise it came after I refused. Yeah. sure.

Hearing of January 9, 1990, p. 24-26

BY MR. EAKIN:

Q Mr. Perrish, (the Guardian ad Litem), in the brief you filed in this court you called the Holyfield a grotesque miscarriage of justice?

A I said it was grotesque, I didn't say it was a miscarriage of justice, did I?

Q Okay. Maybe you deny it. You called it grotesque?

A I think I called the result grotesque.

Q Did you say that it would be a miscarriage of justice for this Court to follow that decision?

A I don't know. You've got it in front of you, you know what it says. What do you want, me to quote it word-for-word?

Q Is it still your opinion that the Holyfield decision is grotesque?

Mr. Oldenburg: Your Honor, I fail to see the relevance in this reference.

Mr. Parrish: I object on that same basis, what's the relevance?

Mr. Eakin: The relevance is that the guardian ad litem is hostile and biased against the Indian Child Welfare Act. This information was not available because these statements were not made until September. If there is a bias on the part of the guardian ad litem, I don't think there's been a fair hearing on whether to transfer jurisdiction or not if the Court has considered the recommendations of the guardian ad litem.

Mr. Parrish: May I respond, Judge?

The Court: You may.

Mr. Parrish: Judge, this Court knows very well the powers of a guardian ad litem are very broad. If a guardian ad litem may not take positions, whether that's contrary to Act of the United States government, the state government, when the guardian ad litem feels that those hinder and are in total opposition of the child, the guardian is appointed to defend, then the guardian is not doing his job. I do not believe that this Act as applied to this child, that Act does not apply in this case and is the antithesis of this child as opposed to the children in the Mississippi case as the way Mr. Duame is trying to apply it in this case.

H. EXCERPTS: REPLY BRIEF OF GUARDIAN AD LITEM

MONTANA TENTH JUDICIAL DISTRICT
COURT, FERGUS COUNTY
****

IN THE MATTER OF)
T.A.S)
A YOUTH IN NEED OF CARE.)
****

RESPONSE BRIEF OF GUARDIAN AD LITEM

***

ARGUMENT: It is the opinion of the

Guardian ad Litem that the Indian Child Welfare Act is unnecessarily and monumentally overbroad. Congress could never have intended that he States should lose their jurisdiction over Indian children physically within their geographical limits. Nor could Congress have intended that Indian children would not enjoy the same rights granted to white children by the U.S. Constitution and by the Constitution's of the individual States. But that is what the counsel for the mother, the counsel for the tribe, and the Court in the Mississippi case would have us believe. ***

If this Court rules that the Youth herein must be sent to the tribe in northern Alaska than, in effect, the basic rights granted to this child under the Montana Constitution totally evaporated. The Court would be saying that because she

is an Indian child she can not avail herself of the services provided by the State of Montana to insure that she can be safe, healthy, and happy within the boarders of the State of Montana. The Court would be saying that she no longer is free from discrimination because she happens to be an Indian child. And the Court would be saying the Section 15 of Article II is a nullity as it applies to this Youth and that she is not entitled to the fundamental rights of Article II Section 15 because she happens to be an Indian under the age of 18 years.

It is the opinion of the Guardian ad Litem that such a ruling would not only be against the best interests of the Youth, but would be as grotesque as the holding in the Mississippi case.

***

RESPECTFULLY SUBMITTED this 14th day of September, 1989.

BRADLEY B. PARRISH
Guardian ad Litem for Youth

I. SELECTED PORTIONS OF THE INDIAN CHILD WELFARE ACT

§ 1901 CONGRESSIONAL FINDINGS

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds -

(1) that clause 3, section 8, article I of the United States Constitution [USCS Constitution, Art.I, § 8, cl 3] provides the "The Congress shall have Power. . . To regulate Commerce. . . with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are member or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relation of Indian people and the cultural and social standards prevailing in Indian communities

and families.
(Nov. 8, 1978, P.L. 95-608,§2, 92 Stat.3069.)

CHILD CUSTODY PROCEEDINGS

§1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) **Exclusive jurisdiction.** An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b)**Transfer of proceedings;declination by tribal court.** In any State court proceeding for the foster care placement of, or termination of parental rights to, and Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provide, That such transfer shall be subject to declination by the tribal court of such tribe.

(c)**State court proceedings; intervention.** In any State court proceeding for the

foster care placement of, or termination of parental rights to, and Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.
(d)**Full faith and credit to public acts, records, and judicial proceedings of Indian tribes.** The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.
(Nov.8, 1978, P.L. 95-608, Title I, §101, 92 Stat. 3071.)

§ 1912. Pending court proceedings
(a) **Notice; time for commencement of proceedings; additional time for preparation.** In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, and Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the

tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) **Appointment of counsel.** In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13) [25 USCS §13].

(c) **Examination of reports or other documents.** Each party to a foster care

placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) **Remedial services and rehabilitative programs; preventive measures.** Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) **Foster care placement orders; determination of damage to child.** No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent of Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) **Parental rights termination order; evidence; determination of damage to child.** No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that he continued custody of

the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (Nov. 8, 1978, P.L. 95-608, Title I, §102, 92 Stat. 3071.)

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences. In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with

(1) a member of the child's extended family;

(2) other member of the Indian child's tribe; or

(3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences. Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with -

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's need.

(c) **Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences.** In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency of court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the court or agency shall give weight to such desire in applying the preferences.

(d) **Social and cultural standards applicable.** The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) **Record of placement; availability.** A record of each such placement, under State law, of and Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section, Such record shall be made available at any time upon

the request of the Secretary or the Indian child's tribe.
(Nov. 8, 1978, P.L. 95-608, Title I, §105, 92 Stat. 3073.)2

Supreme Court, U.S.
FILED
APR 15 1991
OFFICE OF THE CLERK

(2)

No. 90-1306

In The

Supreme Court of the United States

October Term, 1990

KING ISLAND NATIVE COMMUNITY,

Petitioner,

vs.

STATE OF MONTANA DEPARTMENT OF FAMILY SERVICES,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Montana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 1991

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the petitioner was entitled to request transfer of the child custody proceeding below pursuant to 25 U.S.C. § 1911(b) of the Indian Child Welfare Act in the absence of jurisdictional retrocession pursuant to 25 U.S.C. § 1918.

2. Whether, if the petitioner was entitled to request transfer pursuant to 25 U.S.C. § 1911(b), the state courts improperly applied the good cause exception in that provision under the facts before them in denying such request.

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Respondent State of Montana Department of Family Services respectfully submits its brief in opposition to the petition for writ of certiorari.

STATEMENT

This matter arose in Fergus County, Montana when a petition for temporary investigative authority and protective services was filed on September 2, 1988 by the Fergus County Department of Family Services ("County Department") with respect to T.S. pursuant to Mont. Code Ann. § 41-3-402 (1989) (App. at 10a).[1] T.S., then 3½ years old, resided in Denton, Montana with her natural mother and her stepfather. The report accompanying the petition stated that the County Department had received anonymous telephone calls on August 30 and 31, 1988 concerning possible neglect or abuse of the child, and County Department social workers visited T.S.'s home on the latter date, where they interviewed the child and her mother. The mother complained of physical abuse from her husband, while the child had "a red and blood shot left eye" reportedly caused when she had been struck by the mother with a wet washcloth. The mother indicated that she wanted to leave her husband and return to Alaska but lacked transportation or money. She and her child were then taken to an emergency services facility, and T.S. was placed into a licensed foster home later that

[1] Mont. Code Ann. § 41-3-402(1) authorizes the filing of such petitions "[i]n cases where it appears that a youth is abused or neglected or is in danger of being abused or neglected[.]"

day. Telephonic communications occurred on September 1, 1988 between County Department personnel and Alaska child protective services representatives in Anchorage, who reported a history of referrals for physical and other abuse of T.S. by her mother.

The district court granted the petition on the date of its filing, most importantly authorizing the County Department to assume protective custody over T.S. for 90 days, appointing a guardian *ad litem* for her, and setting a show cause hearing on September 20, 1988. *See* Mont. Code Ann. § 41-3-403(1)(c) (1989) (App. at 12a). Following that hearing, the district court entered a second order maintaining the September 2 order in effect and directing the County Department to prepare by December 20, 1988 "a report of the results of its investigation and any recommended disposition as to this matter."

At some point prior to December 1988, County Department representatives orally contacted the attorney for petitioner King Island Native Community to which T.S.'s mother belongs. The attorney requested the County Department to relinquish the child voluntarily to the petitioner's tribal court, but the request was refused. On December 27, 1988 the petitioner filed a motion to intervene in the state court proceedings pursuant to 25 U.S.C. § 1911(c) of the Indian Child Welfare Act ("ICWA"), and intervention was granted the next day.[2]

---

[2] The ICWA applies to any "child custody proceeding" affecting Indian children, which term in part encompasses "foster care placement" and "termination of parental rights" proceedings. 25 U.S.C. § 1903(1)(i), (ii) (App. at 1a). "Foster

(Continued on following page)

On December 29, 1988 the County Department filed in the state district court a petition for permanent legal custody of T.S. and for termination of the mother's parental rights. *See* Mont. Code Ann. § 41-3-401 (1989) (App. at 8a).[3] The petition alleged that a service treatment agreement between the County Department and the mother adopted by the district court on September 22, 1988 had not been complied with by the mother, that her parental unfitness was unlikely to change within a reasonable time, and that she had returned to Alaska. A notice setting hearing on the petition for February 7, 1989 had

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(Continued from previous page)

care placement" means "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated[,]" while "termination of parental rights" means "any action resulting in the termination of the parent-child relationship[.]" (App. at *Id.*) Instantly, there is no dispute that the County Department's September 1988 petition initiated a "foster care placement" proceeding. A second petition, which is discussed in the text and was filed on December 29, 1988, initiated a "termination of parental rights" proceeding. There is also no dispute that T.S. is an "Indian child" as defined in 25 U.S.C. § 1903(4) since her mother is a member of the petitioner and she is eligible for membership. The petitioner, lastly, is both an "Indian tribe" as defined in 25 U.S.C. § 1903(8) and an "Indian child's tribe" with respect to T.S. under 25 U.S.C. § 1903(5). (App. at 2a-3a.)

[3] Mont. Code Ann. § 41-3-401(3) provides that such petitions constitute "a civil action brought in the name of the state of Montana." To the extent the petition for writ of certiorari herein names the Department of Family Services as the respondent, it is technically in error.

previously been forwarded to the mother, the guardian *ad litem* and the petitioner's attorney on December 28, 1988. The hearing was later rescheduled to February 23, 1989.[4]

The petitioner filed a motion to transfer the proceeding to its tribal court pursuant to 25 U.S.C. § 1911(b) and a supporting brief on February 21, 1989. The County Department opposed the transfer request, stating that good cause existed for its denial. The mother joined in the petitioner's transfer request on March 10, 1989. Several additional briefs were submitted addressing the transfer question, the last containing an affidavit by a tribal court judge which stated in part that, "[u]pon an Order by the Fergus County District Court transferring this case to the King Island Tribal Court, our Tribal Court is prepared to issue an immediate Custody Order and send a tribal representative to Montana to bring [T.S.] back to Alaska where she will be placed in an appropriate Native foster home, pending disposition of this matter." (Petition at A37.)

An evidentiary hearing concerning the transfer request occurred on July 19, 1989, at which only a County Department social worker and T.S.'s foster mother testified. The social worker stated the child had done "remarkably well" in foster care but still had "a lot of problems." He added that her foster mother was Indian and that there had been no contact with the child by any tribal representative or member of her extended family since the County Department assumed custody. His

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[4] The February 23 hearing was later vacated at the petitioner's request. The parental rights termination petition remains unresolved pending disposition of this matter.

investigation revealed no indication T.S. had resided in Nome or any other area where the Community had ICWA "reservation" status. The social worker believed T.S.'s best interests would be served by her remaining in Montana since "there's no way that the child is going to survive another move." He then explained the basis for that conclusion:

> Basically where we came up with [the fact that T.S. had always lacked a stable home environment] was . . . that [the mother] has travelled from Anchorage to Illinois to Spokane. She was a time in Great Falls. She was a time in Montana. She was back to Alaska. It was basically obtained from the Alaska Police Department is where we got a lot of the information. I mean, they didn't actually reside in Alaska for any period of time. They were all over the country, and [T.S.] was just drug from one place to the other.

His opinion was reinforced by the foster mother's testimony. The petitioner, although appearing at the transfer hearing through counsel, offered no evidence concerning the effect of transfer to Alaska on T.S. or the County Department's ability to present evidence concerning the pending parental rights termination petition.

The state district court entered a memorandum order denying the transfer request on December 4, 1989. (Petition at A28.) It reasoned that good cause existed for nontransfer because (1) there had been little or no contact between the petitioner and T.S. or her family prior to the proceeding's initiation, (2) witnesses with information most pertinent to the parental rights termination petition were located in Fergus County, and (3) the child's best interests would not be furthered by removal to Alaska

since "[t]he uncontroverted evidence of the hearing in this matter indicated strongly that any transfer of this child from her present environment would 'devastate' the child and would have long-term harmful effects upon her." (Petition at A31-A32.)

The petitioner appealed the state district court's decision to the Montana Supreme Court. The latter court affirmed the transfer denial, agreeing with the district court's factual findings concerning the impact on T.S. if she were removed to Alaska and the inconvenient nature of an Alaskan forum. (Petition at A8, A12; 801 P.2d at 80-81, 82.) The Supreme Court found no support in the record for the petitioner's claim that "there [had] been intentional delay resulting in a greater period in which bonding has occurred in the foster home." (Petition at A11; 801 P.2d at 81.)[5]

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[5] The Supreme Court did not discuss the factual basis for this conclusion. However, the district court record reflects that briefing on the petitioner's transfer request was not completed until April 3, 1989 and that the petitioner took no action to schedule a hearing on such request. After the evidentiary hearing on July 19, the parties engaged in further briefing on the transfer issue, which did not conclude until September 29, 1989. The district court, finally, relied only on evidence adduced during the July 19 hearing in its December 4 memorandum opinion. There is accordingly no basis for the petitioner's claim of either intentional or institutional delay prejudicing its interests.

SUMMARY OF THE ARGUMENT

The questions raised in the petition assume entitlement to referral jurisdiction under 25 U.S.C. § 1911(b) with respect to the parental rights termination proceeding involving T.S. However, the petitioner is subject to state adjudicatory jurisdiction under Public Law No. 280 and has not reassumed jurisdiction over child custody proceedings in accordance with 25 U.S.C. § 1918. Absent reassumption of such jurisdiction, the transfer provisions in § 1911(b) did not apply to its request and, therefore, the questions raised in the petition need not be addressed.

Even if the transfer provisions in § 1911(b) did apply below, no substantial federal question exists warranting review of the Montana Supreme Court's decision. Section 1911(b) does not require transfer of a child custody proceeding affecting an Indian child not domiciled or residing within the reservation of its tribe from state to tribal court if good cause for denying transfer is present. The ICWA does not define the term "good cause" but, with one exception, those courts applying such term have held that the child's best interests may constitute an element in determining whether transfer should occur. Courts, moreover, have recognized without exception that *forum non conveniens* considerations may serve as a basis for denying transfer. Consequently, even without reference to the best interests of T.S., transfer of jurisdiction over the parental rights termination proceeding to the petitioner's court was denied on wholly acceptable grounds. The petitioner thus does little more than dispute factual determinations which, while fully supported by the record below, it dislikes.

ARGUMENT

I. Absent a Showing That the Petitioner Reassumed Jurisdiction Over Child Custody Proceedings Under 25 U.S.C. § 1918, the Transfer Provisions in 25 U.S.C. § 1911(b) Did Not Apply to the Proceeding Below.

Although not argued before the state district court, the issue of whether the petitioner was entitled to transfer of the parental rights termination proceeding to its courts pursuant to 25 U.S.C. § 1911(b) in the absence of reassumption of jurisdiction over child custody proceedings under 25 U.S.C. § 1918 (App. at 5a) was raised by the respondent before the Montana Supreme Court. That court chose not to address the issue in its opinion. Notwithstanding the Supreme Court's silence, review on the merits of the questions raised in the petition should occur only if this Court first determines the petitioner was eligible for referral jurisdiction under any circumstances.[6]

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[6] The lack of the issue's discussion does not mean that, as a matter of state appellate practice, the court concluded the respondent's right to raise the underlying applicability of the transfer requirement in § 1911(b) had been waived. *See, e.g., McCain v. Batson*, 233 Mont. 288, 298, 760 P.2d 725, 731 (1988) ("the Court will uphold the result below if it is correct, regardless of the reasons given below for the result"); *Phillips v. City of Billings*, 233 Mont. 249, 252, 758 P.2d 772, 774 (1988) (same). Even had the issue been deemed waived as a matter of state law, it cannot be disregarded for purposes of resolving the petition, since the petitioner would seemingly lack Article III standing to challenge the Montana Supreme Court's decision unless, as a threshold matter, it is encompassed within that class of tribes to which referral jurisdiction under § 1911(b) is

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Recognizing that tribal courts in Alaska and other states which have been given or voluntarily assumed civil jurisdiction under Public Law No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-25, 28 U.S.C. § 1360), might be ill-suited to adjudicate child custody proceedings, Congress has required tribes in such states to secure approval from the Secretary of the Interior before exercising exclusive or referral jurisdiction over those proceedings pursuant to § 1911(a) or (b):

> Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588) . . . or pursuant to any other Federal law, may reassume jurisdiction over child custody proceed ings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

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available. *See, e.g., ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("[w]e have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute"); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) ("[s]tanding to sue in any Article III court is, of course, a federal question which does not depend on the party's prior standing in state court").

25 U.S.C. § 1918(a); *see Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 n.16 (1989) ("where Public Law 280 jurisdiction is present, ICWA § 1918 permits a tribe . . . to reassume jurisdiction over child custody proceedings upon petition to the Secretary of the Interior"). Section 1918(b) contains certain criteria which the Secretary may consider in determining reassumption petitions and additionally accords him substantial discretion in granting partial retrocession of jurisdiction:

> In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

25 U.S.C. § 1918(b)(2). The House Report accompanying the bill eventually adopted as the ICWA summarized § 1918(b) as follows:

> Subsection (b) authorizes the Secretary, in considering a petition for reassumption, to take into consideration various factors affecting the exercise of such jurisdiction, including membership rolls, size of reservation or former reservation, and population base. Depending on such circumstances, the Secretary is given the flexibility to authorize partial retrocession based upon the referral authority under section 101(b) or to limit the geographic scope of the full exercise of 101(a) jurisdiction. The subsection was adopted

> as an amendment in order to take into consideration special circumstances, such as those occurring in Alaska and Oklahoma.

H.R. Rep. No. 1386, 95th Cong. 2d Sess. 24-25, *reprinted in* 1978 *U.S. Code Cong. & Admin. News* 7530, 7547.

It is thus quite clear that, as § 1918's literal language indicates, tribes subject to Public Law No. 280 have neither exclusive jurisdiction under § 1911(a) nor referral jurisdiction under § 1911(b) over child custody proceedings until the requisite secretarial approval is received. Notice of such approval, moreover, must be published in the Federal Register, and the retrocession of jurisdiction only becomes effective 60 days after that publication. 25 U.S.C. § 1918(c). The petitioner alleged below no secretarial authorization of its reassumption of jurisdiction over child custody proceedings, and none is reflected in the Federal Register. There is consequently no dispute that, were the proceeding below initiated in Alaska, transfer would have been foreclosed by the lack of § 1918 retrocession.[7] The only question is whether a different

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[7] Consistent with the express mandate of § 1918, the Alaska Supreme Court has found a lack of tribal court jurisdiction in child custody proceedings, absent reassumption, in § 1911(a) and § 1911(b) contexts. *In re K.E.*, 744 P.2d 1173 (Alaska 1987) (per curiam) (remanding for determination of whether reassumption had been authorized where Indian child alleged to reside within his native village); *Native Village of Nenana v. State*, 722 P.2d 219 (Alaska), *cert. denied sub nom. Native Village of Nenana v. Alaska Department of Health and Social Services*, 479 U.S. 1008 (1986) (affirming superior court's denial of a transfer request under § 1911(b) with respect to an Indian child domiciled away from his native village); *cf. Native Village*

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result should apply simply because the proceeding is pending in another state. Both the ICWA and common sense suggest not.

Although § 1911(b) directs transfer of a child custody proceeding involving an Indian child domiciled away from his reservation "to the jurisdiction of [his] tribe" upon the tribe's petition absent good cause to the contrary or parental objection, it obviously contemplates that such transfer will be to a tribal court since the final sentence of § 1911(b) permits the requesting tribe's court to decline acceptance of the transfer. The term "tribal court" is defined as "a court *with jurisdiction over child custody proceedings* and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings." 25 U.S.C. § 1903(12) (emphasis supplied). Here, however, the petitioner's tribal court lacks jurisdiction, at least for § 1911(a) or (b) purposes, because reassumption of authority over child custody proceedings has not been effected pursuant to § 1918. The retrocession provisions themselves explicitly condition exercise of *any* exclusive or referral jurisdiction over child custody proceedings by a tribe subject to state

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of Venetie I.R.A. Council v. Alaska, 918 F.2d 797, 810-11 (9th Cir. 1990) (suggesting that, while a native village was not divested of inherent authority over child custody proceedings by Public Law No. 280, exclusive or referral jurisdiction under the ICWA was conditioned on § 1918 retrocession).

court jurisdiction under Public Law No. 280 upon secretarial approval, and nothing in that section can reasonably be construed as limiting the approval requirement to proceedings arising within the state where the tribe is located. Section 1918 was instead intended to preclude tribal exercise of exclusive or referral jurisdiction over child custody proceedings pursuant to the ICWA "until such time as there is satisfactory proof that a particular tribe has the ability to properly adjudicate such cases" established through compliance with such section. *Native Village of Nenana*, 722 P.2d at 222. A different conclusion would create a jurisdictional distinction between a tribe's resident state and all other states wholly unsupported by a natural reading of § 1918 or its underlying purpose of ensuring an adequate forum for resolving child custody disputes.[8] Transfer under § 1911(b) to the petitioner's tribal court was therefore not required without regard to the good cause exception.

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[8] Tribal court adjudication of child custody proceedings entails not only the entry of orders but also the availability of appropriate child care services to carry out those orders. One of the reassumption criteria utilized by the Secretary is thus whether "[c]hild care services sufficient to meet the needs of most children the tribal court finds must be removed from parental custody are available or will be available at the time of reassumption of jurisdiction[.]" 25 C.F.R. § 13.12(5) (1990). Needless to say, the need for those services exists irrespective of whether the involved child over whom jurisdiction is transferred resided within or without the tribe's state prior to such transfer.

II. Under the Particular Facts Presented, the Montana Supreme Court's Decision Represents an Appropriate Application of the Good Cause Exception in § 1911(b).

Reduced to its essentials, the petitioner's argument derives from the premise that an Indian child's best interests may never be considered by a state court in making referral determinations under § 1911(b). Use of the best interests factor thus is portrayed as "necessarily assum[ing] that the tribal court either is not competent to decide the case, or is unwilling to act in the child's best interests, or both." (Petition at 11.) Its argument, however, ignores the absence of any textual basis in the ICWA for such a narrow construction of good cause and the particular facts in this matter.

The party opposing transfer to tribal court jurisdiction under § 1911(b) bears the burden of establishing good cause for the retention of state court jurisdiction.[9] That term is not defined in the ICWA, but House Report 1386 commented it was "intended to permit a state court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to ensure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." H.R. Rep. No. 1386 at 21, *reprinted in* 1978 *U.S. Code Cong. & Admin. News* at 7544. The *forum non conveniens* doctrine has been relied upon in various

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[9] *E.g., In re Adoption of R.R.R.*, 763 P.2d 94, 104 (Okla. 1988); *In re Wayne R.N.*, 757 P.2d 1333, 1335 (N.M. Ct. App. 1988); *In re M.E.M.*, 195 Mont. 329, 336, 635 P.2d 1313, 1317 (1981).

cases as a ground for finding good cause to refuse transfer,[10] but other reasons have included delay in tribal intervention in the state court proceedings,[11] delay in submitting a transfer request,[12] or the perceived adverse emotional or physical impact on an Indian child if uprooted from its present familial environment.[13] These decisions reflect unanimity among state courts that the good cause standard in § 1911(b) must be applied flexibly to balance the interests of the affected parties in light of the case's specific facts.

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[10] *E.g., In re Robert T.*, 200 Cal. App. 3d 657, 666-67, 246 Cal. Rptr. 168, 174 (1988); *In re Wayne R.N.*, 757 P.2d at 1336; *In re N.L.*, 754 P.2d 863, 869 (Okla. 1988); *In re J.R.H.*, 358 N.W.2d 311, 317 (Iowa 1984); *In re Bird Head*, 331 N.W.2d 785, 790 (Neb. 1983); *In re Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d 187, 191 (Ariz. Ct. App. 1981), *cert. denied sub nom. Catholic Social Services v. Pima County*, 455 U.S. 1007 (1982).

[11] 25 U.S.C. § 1911(c) grants a child's Indian custodian or tribe the right to intervene "at any point" in a foster care placement or termination of parental rights proceeding. Tribal intervention in other child custody proceedings is not guaranteed by this provision, but the right of a tribe to intervene may exist independently under state law. *See In re J.R.S.*, 690 P.2d 10, 1519 (Alaska 1984) (tribe did not have right to intervene under § 1911(c) in an adoption proceeding but did have such right under state court rules); *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228, 233 (Ariz. Ct. App. 1983) (same).

[12] *E.g., In re Dependency & Neglect of A.L.*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 550 (S.D. 1989); *In re Robert T.*, 200 Cal. App. 3d at 665, 246 Cal. Rptr. at 173-74; *In re Laurie R.*, 760 P.2d 1295, 1299 (N.M. Ct. App. 1988); *In re Wayne R.N.*, 757 P.2d at 1335-36.

[13] *E.g., In re Robert T.*, 200 Cal. App. 3d at 667, 246 Cal. Rptr. at 174-75; *In re Adoption of T.R.M.*, 525 N.E.2d 298, 308 (Ind. 1988); *In re G.L.O.C.*, 205 Mont. 352, 357, 668 P.2d 235, 238 (1983).

Indeed, the only state appellate decision suggesting that the best interests of an Indian child may not be considered in determining referral jurisdiction good cause issues is *In re Armell*, 550 N.E.2d 1060 (Ill. Ct. App.), *cert. denied sub nom. Armell v. Prairie Band of Potawatomi Indians*, 111 S. Ct. 345 (1990).[14] It reasoned that "considerations involving the best interests of a child are relevant not to determine jurisdiction but to ascertain placement." Id. at 1065. Whatever merit this reasoning had under the

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[14] The petitioner also argues that three other decisions, *In re B.W.*, 454 N.W.2d 435 (Minn. Ct. App. 1990), *Pima County Juvenile Action No. S-903*, *supra*, and *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986), support the proposition that a child's best interests may not be considered. (Petition at 16-18.) *B.W.*, however, involved an appeal from a termination of parental rights and did not address the good cause issue. *Pima County* and *Halloway* both arose from application of the mandatory transfer provision in § 1911(a), although *Pima County* did discuss general § 1911(b) transfer criteria in dicta but not the question of whether, under appropriate circumstances, transfer could be denied because of its effect on a child's emotional or physical well-being. 635 P.2d at 191-92. The quotation from *Pima County* at pages 17 and 18 of the petition is unrelated to any § 1911(b) issue; it instead was concerned with whether, if the Arizona courts had possessed jurisdiction, the biological mother's parental rights could be terminated in part because of the impact on the child of removal from its adoptive parents. The Arizona court resolved that question in the negative, as has the Montana Supreme Court under its state law. *E.g.*, *In re Guardianship of Aschenbrenner*, 182 Mont. 540, 547-48, 597 P.2d 1156, 1161 (1979); *In re Guardianship of Doney*, 174 Mont. 282, 286-87, 570 P.2d 575, 578 (1977); *In re Fish*, 174 Mont. 201, 206, 569 P.2d 924, 928 (1977).

facts in *Armell*,[15] here it has none. The petitioner unequivocally indicated through the tribal judge's affidavit and in a later submission to the state district court[16] that it intended to remove T.S. to Alaska if jurisdiction was transferred, and the district court relied upon these representations in denying transfer.[17] There is consequently no dispute that, had transfer been ordered, T.S. would have been taken from her foster parents in Montana and placed in a new familial setting in Alaska. There is equally no dispute, on the basis of the state district court record, that such a transfer would have been harmful to her. Under these circumstances, the petitioner's suggestion that the effect of a child's placement in an entirely

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[15] There an appeal was taken from a trial court determination that good cause did not exist to deny transfer of a child custody proceeding, after which determination the trial court awarded custody to the tribe's social service agency and the agency directed that the child remain with her present foster parents while a placement investigation was conducted. 550 N.E.2d at 1063. It appears that, at the time the tribal agency's order was made, the child was living with her foster parents in California. *Id.*

[16] D.C. Doc. 20 at 1-2 ("The Tribe has become extremely concerned about the delay which has taken place so far, and given the stage in which this proceeding is presently at, unless this matter is made a priority by all parties, this matter could drag on for a considerable time yet to come. This would not be in the best interest of [T.S.]. Especially, assuming *arguendo*, that the Tribe is ultimately successful in having the child returned to the State of Alaska").

[17] "The Tribe argues here that the Indian Child Welfare Act mandates a transfer of the jurisdiction of this case to the Tribal Court in Alaska. They have further argued that physical custody of the child . . . should also be transferred to the Tribe." (Petition at A29.)

different environment must be ignored as a matter of law in § 1911(b) transfer decisions cannot be reconciled with either the ICWA's use of the broad term "good cause" or the legislative history indicating that term is to be applied flexibly so as to balance the interests of the affected parties, including the Indian child.[18]

Contrary to the petitioner's claim (Petition at 7-11), *Holyfield* neither compels nor even suggests a contrary conclusion. That decision, as the Montana Supreme Court observed (Petition at A13; 801 P.2d at 82), is inapposite because it was concerned only with the existence *vel non* of exclusive tribal jurisdiction under § 1911(a) – an issue

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[18] "Although the Department of the Interior's interpretive ICWA guidelines do not specify a child's best interests as a consideration in resolving good faith transfer questions, relevant commentary states that, where there has been limited contact between a child and the reservation of its tribe, "the shock of changing cultures may, in some cases, be harmful to a child." 44 Fed. Reg. 67,584, 67,591 (1979) (Guideline C.3 Commentary) (App. at 16a). The guidelines then suggest that a determination as to the possibility of such culture shock "can be made by the parent, who has a veto on transfer to tribal court" and that, even if a parent is unavailable, "[s]tate court authority to make such decisions is limited to those cases where the child is over five years of age" since "[m]ost children younger than five years can be expected to adjust more readily to a change in cultural environment." *Id.*

It nevertheless seems clear that, when the parent is being accused of neglect in a child custody proceeding, her judgment as to the child's best interests may be less than dispassionate or reliable. Moreover, the assumption that children younger than five years will necessarily be more amenable to changes in cultural environment is a generalization which, in this matter, appears highly suspect. Under the circumstances here the guidelines are entitled to little, if any, deference.

turning there solely on where the involved children were domiciled. *See In re M.R.D.P.*, 787 P.2d 1219, 1224 (Mont. 1990) (rejecting claim that transfer mandated under § 1911(a) should be denied because of the child's bonding with adoptive parents; "[t]he sole issue under consideration is whether the tribal court has exclusive jurisdiction under 25 U.S.C. § 1911(a)"). Nothing in *Holyfield* proscribes consideration of the effect of uprooting a child from its present familial environment as part of good cause decisionmaking under § 1911(b).

Finally, the Montana Supreme Court and the state district court did not rely exclusively upon the best interests of T.S. in denying transfer. They also pointed to the inconvenience of a tribal court forum thousands of miles away from Fergus County where the majority of witnesses and evidence pertinent to the parental rights termination petition are located. The Department of the Interior guidelines recognize that "application of [the *forum non conveniens*] criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation." 44 Fed. Reg. 67,591 (Guideline C.3 Commentary) (App. at 17a); *accord Chester County Department of Social Services v. Coleman*, 399 S.E.2d 773, 776 (S.C. 1990) (per curiam) (reversing transfer order where the substantial majority of witnesses and evidence was located in South Carolina, "while the tribal court is located several thousand miles away in South Dakota"). This additional factor militating against transfer

underscores the fact-bound nature of the decision below and its inappropriateness for review.[19]

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[19] The petitioner states that, "[i]f the tribe determined it would be more convenient to have the case heard in Montana, it could send a tribal judge to Montana, or could appoint a judge from a local tribe or a resident Indian lawyer to act as a special master to take testimony and make findings after hearing the matter in Montana." (Petition at 12.) Before the Montana Supreme Court, however, the petitioner was far less forthcoming:

> As pointed out by the Tribe in earlier briefing, . . . the participation of witnesses telephonically is a common practice in Alaska. Furthermore, if required, the Tribe is prepared to adopt the solution proposed by the *Guidelines*: i.e., appointing a tribal court judge in the city where most of the evidence and witnesses may be (Anchorage), or having the present court travel to Anchorage to hear whatever testimony cannot be solicited in any other way. *Guidelines*, at 67591. (It is not anticipated this would be required, but the *Guidelines* clearly indicate this should be an available option as a means of avoiding the denial of a transfer request.)

The protean nature of the petitioner's position in this regard parallels its now-asserted willingness to consider leaving T.S. in her present foster home.

CONCLUSION

The respondent respectfully requests that the petition for writ of certiorari be denied.

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25 U.S.C. § 1903 (1988)

Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term –

(1) "child custody proceeding" shall mean and include –

> (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
>
> (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
>
> (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
>
> (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has

reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of

Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

25 U.S.C. § 1911(a) and (b) (1988).

Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1918 (1988).

Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

> (i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;
>
> (ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;
>
> (iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court

has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

Mont. Code Ann. § 41-3-401 (1989).

Abuse neglect, and dependency petitions. (1) The county attorney, attorney general, or an attorney hired by the county welfare department or office of human services shall be responsible for filing all petitions alleging abuse, neglect, or dependency. The county attorney or attorney general, or an attorney hired by the county welfare department or office of human services with the written consent of the county attorney or attorney general, may require all state, county, and municipal agencies, including law enforcement agencies, to conduct such investigations and furnish such reports as may be necessary. Investigations as to financial status may not be made prior to the adjudicatory hearing provided for in 41-3-404.

(2) Upon receipt of a petition, the court shall set a date for an adjudicatory hearing on the petition. Such petitions shall be given preference by the court in setting hearing dates.

(3) A petition alleging abuse, neglect, or dependency is a civil action brought in the name of the state of Montana. The rules of civil procedure shall apply except as herein modified. Proceedings under a petition are not a bar to criminal prosecution.

(4) The parents or parent, guardian, or other person or agency having legal custody of the youth named in the petition, if residing in the state, shall be served personally with a copy of the petition and summons at least 5 days prior to the date set for hearing. If such person or agency cannot be served personally, the person or agency may be served by publication in the manner provided by

the Montana Rules of Civil Procedure for other types of proceedings.

(5) In the event personal service cannot be made upon the parents or parent, guardian, or other person or agency having legal custody, the court shall appoint an attorney to represent the unavailable party where in the opinion of the court the interests of justice require.

(6) If a parent of the child is a minor, notice shall be given to the minor parent's parents or guardian, and if there is no guardian the court shall appoint one.

(7) Any person interested in any cause under this chapter has the right to appear.

(8) Except where the proceeding is instituted or commenced at the request of the department of family services, a citation shall be issued and served upon a representative of the department prior to the court hearing.

(9) The petition shall:

(a) state the nature of the alleged abuse, neglect, or dependency;

(b) state the full name, age, and address of the youth and the name and address of his parents or guardian or person having legal custody of the youth;

(c) state the names, addresses, and relationship to the youth of all persons who are necessary parties to the action.

(10) The petition may ask for the following relief:

(a) temporary investigative authority and protective services;

(b) temporary legal custody;

(c) termination of the parent-child legal relationship and permanent legal custody with the right to consent to adoption;

(d) any combination of the above or such other relief as may be required for the best interest of the youth.

(11) The petition may be modified for different relief at any time within the discretion of the court.

(12) The court may at any time on its own motion or the motion of any party appoint counsel for any indigent party.

Mont. Code Ann. § 41-3-402 (1989).

Petition for temporary investigative authority and protective services. (1) In cases where it appears that a youth is abused or neglected or is in danger of being abused or neglected, the county attorney, attorney general, or an attorney hired by the county welfare department or office of human services may file a petition for temporary investigative authority and protective services.

(2) A petition for temporary investigative authority and protective services shall state the specific authority requested and the facts establishing probable cause that a youth is abused or neglected or is in danger of being abused or neglected.

(3) The petition for temporary investigative authority and protective services shall be supported by an affidavit signed by the county attorney, attorney general, or an attorney hired by the county welfare department or office of human services or a department of family services report stating in detail the facts upon which the request is based.

Mont. Code Ann. § 41-3-403 (1989).

Order for immediate protection of youth. (1)(a) Upon the filing of a petition for temporary investigative authority and protective services, the court may issue an order granting such relief as may be required for the immediate protection of the youth.

(b) The order, along with the petition and supporting documents, shall be served by a peace officer or a representative of the department of family services on the person or persons named therein. When the youth is placed in a medical facility or protective facility, the department shall notify the parents or parent, guardian, or other person having legal custody of the youth, at the time the placement is made or as soon thereafter as possible.

(c) The order shall require the person served to comply immediately with the terms thereof or to appear before the court issuing the order on the date specified and show cause why he has not complied with the order. The show cause hearing must be conducted within 20 days of the issuance of the order by the judge or a master appointed by the judge. The person filing the petition has the burden of presenting evidence establishing probable cause for the issuance of the order. Except as otherwise provided herein, the rules of civil procedures shall apply.

(d) Upon a failure to comply or show cause the court may hold the person in contempt or place temporary legal custody of the youth with the department of family services until further order.

(2) The court may grant the following kinds of relief:

(a) right of entry by a peace officer or department of family services worker;

(b) medical and psychological evaluation of youth or parents, guardians, or person having legal custody;

(c) require the youth, parents, guardians, or person having legal custody to receive counseling services;

(d) place the youth in temporary medical facility or facility for protection of the youth;

(e) require the parents, guardian, or other person having custody to furnish such services as the court may designate;

(f) such other temporary disposition as may be required in the best interest of the youth.

Selected Portions of Department of the Interior Guidelines on Implementation of Indian Child Welfare Act (44 Fed. Reg. 67,584, 67,591 (1979))

C.3. Determination of Good Cause to the contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

C.3. Commentary

* * *

Although there was some support for the third and fourth criteria [of an earlier version of the guidelines] the preponderance of the comment concerning them was critical. The third criteria was whether the child had little or no contact with his or her Indian tribe for a significant period of time. The fourth was whether the child had ever resided on the reservation for a significant period of time. These criteria were criticized, in part, because they would virtually exclude from transfers infants who were born off the reservation. Many argued that the tribe has a legitimate interest in the welfare of members who have not had significant previous contact with the tribe or the reservation. Some also argued that these criteria invited the state courts to be making the kind of cultural decisions that the Act contemplated should be made by tribes. Some argued that the use of vague words in these criteria accorded state courts too much discretion.

The fifth criteria was whether a child over the age of twelve objected to the transfer. Comment on this criteria was much more evenly divided and many of the critics were ambivalent. They worried that young teenager could be too easily influenced by the judge or by social workers. They also argued that fear of the unknown would cause many teenagers to make an ill-considered decision against transfer.

The first four criteria in the earlier version were all directed toward the question of whether the child's connections with the reservation were so tenuous that transfer back to the tribe is not advised. The circumstances

under which it may be proper for the state court to take such considerations into account are set out in the revised subsection (iv).

It is recommended that in most cases state court judges not be called upon to determined whether or not a child's contacts with a reservation are so limited that a case should not be transferred. This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto over transfer to tribal court.

This reasoning does not apply, however, where there is no parent available to make that decision. The guidelines recommend that state courts be authorized to make such determinations only in those cases where there is no parent available to make it.

State court authority to make such decisions is limited to those cases where the child is over five years of age. Most children younger than five years can be expected to adjust more readily to a change in cultural environment.

The fifth criterion has been retained. It is true that teenagers may make some unwise decisions, but it is also true that their judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives.

The existence of a tribal court is made an absolute requirement for transfer of a case. Clearly, the absence of a tribal court is good cause not to ask the tribe to try the case.

Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the § 1911(b), "The subsection is intended to permit a State court to apply to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.

Application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation. This problem may be alleviated in some instances by having the court come to the witnesses. The Department is aware of one case under that Act where transfer was conditioned on having the tribal court meet in the city where the family lived. Some cities have substantial populations of members of tribes from distant reservations. In such situations some tribes may wish to appoint members who live in those cities as tribal judges.

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In The

Supreme Court of the United States

October Term, 1990

KING ISLAND NATIVE COMMUNITY,

Petitioner,

v.

STATE OF MONTANA
DEPARTMENT OF FAMILY SERVICES,

Respondent.

Petition For Writ Of Certiorari To The Montana Supreme Court

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS*

Amicus Curiae, the Navajo Nation, joins the Petitioner in urging the Court to grant certiorari in this case. The parties have consented to the filing of this brief as required in this Court's Rule 37. The Navajo Nation is the largest Indian tribe, with a reservation that spans three states, and with enrolled members residing throughout the United States. Because of their numbers and the mobility of their families, children of the Navajo Nation are involved with state social service workers and state court systems on a daily basis.

The Navajo Nation has inherent authority to determine the custody of its children. The Indian Child Welfare Act both recognizes this retained power of Indian tribes and legislates the role of states in Indian child custody proceedings. This case involves a jurisdictional dispute between an Indian tribe and the courts of a state. The case presents a difficult question, not because the law in unclear, but because courts are loath to relinquish their power, particularly when a given cause strikes the court as deserving of its special attention. Courts have demonstrated great ingenuity in achieving their desired results; the "best interest" test employed by the Supreme Court of Montana to deny transfer to the King Island Native Community is an example.

The Navajo Nation urges this Court to accept certiorari to put an end to this practice which circumvents the ICWA and impairs the ability of tribes to protect their rights in their children.

REASONS FOR ISSUING THE WRIT

I. MONTANA'S USE OF A "BEST INTEREST OF THE CHILD" STANDARD TO FIND GOOD CAUSE NOT TO TRANSFER AN INDIAN CHILD CUSTODY PROCEEDING TO A TRIBAL COURT DEFEATS THE PURPOSES OF THE INDIAN CHILD WELFARE ACT

This case presents a difficult jurisdictional question. What rule will dictate the most appropriate forum when a state court and a tribal court have concurrent jurisdiction and are each empowered to hear an Indian child custody proceeding? The Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. §1901 *et seq.*) provides that when an Indian child's tribe requests a transfer of jurisdiction of a state proceeding to tribal court, the state must cede jurisdiction absent good cause to the contrary. 25 U.S.C. §1911(b).[1] This case turns on the good cause exception.

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[1] 25 U.S.C. §1911(b) deals only with jurisdiction over Indian children domiciled or residing off-reservation.

> Transfer of proceedings; declination by tribal court. In any State court proceedings for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

§1911(a) provides that Indian tribes have exclusive jurisdiction over children domiciled or residing on the reservation.

The Montana Supreme Court has established a rule that in making a good cause determination under the ICWA, the courts of the state must look to the best interest of the child.[2] Pet. App. at A7. If the state court finds that the child's best interest will be harmed by transfer to the tribal court, the tribe's transfer request can be denied. The decision of the Montana Supreme Court eviscerates the ICWA by substituting a highly subjective "best interest" standard for the jurisdictional good cause determination intended by Congress.

A. The modified *forum non conveniens* doctrine of §1911(b) of the ICWA mandates transfer upon request absent good cause to the contrary

Congress in enacting the transfer provision at 1911(b) intended to created within the ICWA's jurisdictional framework a modified doctrine of *forum non conveniens*. H.R. Rep. No. 1386 at 21, 1978 U.S. Code Cong. & Ad. News 7530, 7544. The doctrine recognizes that state courts *can* exercise jurisdiction over non-reservation Indian children, but mandates that they yield to the jurisdiction of the tribe when transfer is requested.[3]

Traditional *forum non conveniens* analysis allows a court having jurisdiction to dismiss an action in favor of a

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[2] The test applied by the Montana Supreme Court was first enunciated by that court in *In the Matter of M.E.M., Youth in Need of Care*, 195 Mont. 329, 336, 635 P.2d 1313, 1317 (1981).

[3] In *Mississippi Choctaw v. Holyfield*, 490 U.S. 30 (1988) this court characterized §1911(b) as creating "concurrent but presumptively tribal jurisdiction".

more appropriate forum. F. James & G. Hazard, *Civil Procedure* 657-658 (2d ed. 1977). The "modified" doctrine codified in the ICWA does not merely permit, but demands dismissal of a state proceeding and transfer to the tribal court absent good cause not to transfer.

Long before the enactment of the ICWA, the exclusive power of tribes to regulate their internal affairs was accepted law. *U.S. v. Kagama*, 118 U.S. 375, 381 (1886). In *Fisher v. District Court*, 424 U.S. 382 (1971), this Court held that the interest of tribes in governing their affairs extended to child custody proceedings and that exercise of state court jurisdiction over the adoption of an Indian child by members of his tribe "plainly would interfere with the powers of self-government conferred upon the . . . Tribe and exercised through the Tribal Court." 424 U.S. at 387.

The ICWA must be read against this backdrop of tribal sovereignty. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973). The ICWA codified the existing case law regarding reservation Indian child custody proceedings in its exclusive jurisdiction provision at §1911(a). However Congress, expressing concern for the vitality of tribes and the necessity of preserving the cultural heritage of their Indian children as a means of tribal survival (25 U.S.C. §§1901-1902), went beyond developed case law and further limited the role of states in child custody proceedings concerning off-reservation Indian children.

Section 1911(b) with its modified doctrine of *forum non conveniens* recognizes that tribes should control the custody of Indian children. H.R. Rep. No. 1386 at 14-15,

1978 U.S. Code Cong. & Ad. News at 7537. It both creates concurrent jurisdiction in states and tribes and dictates the resolution of any jurisdictional disputes.

B. The "good cause" exception is limited to considerations of convenience and fairness in the exercise of jurisdiction

Analysis under the "good cause" exception to transfer provided by Congress should focus on jurisdictional prerequisites to providing an Indian child an adequate forum. Only when a fair hearing cannot be had in a tribal forum should a state court decline to transfer.

While Congress did not define "good cause" in the Act, the United States Department of the Interior, Bureau of Indian Affairs, has promulgated *Guidelines for State Courts; Indian Child Custody Proceedings* (Bureau *Guidelines*), 44 Fed. Reg. 67584, which speak to the issue of "good cause". The five criteria for denying transfer developed by the Bureau are not universally lauded by Indian tribes and their advocates, but they do list objective jurisdictional considerations. The criteria are lack of a tribal court, delay in requesting transfer, objection by a child over twelve, unavailability of evidence, and unavailability of the parents of a child over twelve coupled with no contact with the tribe. 44 Fed. Reg. 67591. The criteria address the appropriateness of the state or tribal court to hear the action.

The Bureau *Guidelines* make explicit that socio-economic conditions or the perceived inadequacy of tribal social services or judicial systems may not be considered by a state court in determining that good cause to deny

transfer exists. The decision of the Montana Supreme Court in this case relies on little else.

C. The "best interest" standard applied by Montana gives the state courts unlimited discretion and impermissibly expands the scope of inquiry beyond jurisdictional concerns

Construing the ICWA in *Mississippi Choctaw Band of Indians v. Holyfield*, 490 U.S. 30 (1989) this Court stated that "it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law." 490 U.S. at ___.[4] The interpretation given the term "good cause" in §1911(b) is critical to the jurisdictional framework of the ICWA. Allowing Montana to substitute its own "best interest" standard will permit a regression in the law and return to a time when state courts "failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 15 U.S.C. §1901(5). A review of the various holdings in this case support this conclusion.

This case involves Elizabeth M., an Alaskan Eskimo, and her daughter Teresa S. The family moved from Alaska to Montana in the Summer of 1988 and had been in Montana only one month when Teresa was taking into protective custody by state social workers. Elizabeth

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[4] In *Mississippi Choctaw* the Court's inquiry was addressed to the definition given the word "domicile", contained in §1911(a), by the Mississippi Supreme Court.

returned home to Alaska shortly after the state's intervention and notified her tribe, the King Island Native Community, of Teresa's placement. The child is alleged to have been abused for most of her 3½ year life before she was removed from her mother's custody by Montana officials.

In making its "jurisdictional" decision the Montana Supreme court focuses on the "stable, loving home" Teresa has found with her Montana foster family, and contrasts it with the abuse suffered at the hands of her natural parents. Pet. App. at 11. The clear import of the court's decision not to transfer is that a life of hardship and abuse is all the Tribe has to offer Teresa.

The Court opines that if the Tribe were truly interested in Teresa's welfare it would have intervened to stop the abuse of Teresa before Montana's involvement became necessary. Pet. App. at 10. In its original decision the Court went so far as to hold that this prior lack of involvement of the tribe in protecting the child constituted good cause not to transfer. Pet. App. at 24. The trial court expresses its contempt for the Tribe more blatantly, questioning the motives of the Tribe in moving to intervene and transfer the child custody proceeding. Pet. App. at 30.

This case presents a classic example of the lack of sensitivity in state courts that the ICWA was designed to address. The Tribe has not been previously involved with Teresa because it was not informed, appropriately, of the voluntary services provided Teresa in Alaska, and, illegally, of the court proceeding instituted in Montana. Once

informed of Teresa's plight, the Tribe moved quickly to seek her return.

The opinions of the Montana trial and appellate courts demonstrate a lack of understanding of the traditional support systems available to Native people in their own communities. Elizabeth's return to King Island and the subsequent motion to transfer are viewed with suspicion by the state courts. They see a conspiracy rather than a community galvanized to aid one of its members, a response regrettably foreign in modern white communities.

The Montana Supreme Court pays lip service to the ICWA, stating that Teresa has been placed in a foster home "within reasonable proximity to the child's home in Fergus County" (Pet. App. at A10), a requirement found at 25 U.S.C. §1915(b). However the intent of the provision is to allow for continued contact by mother and child so that the rehabilitative services mandated by 25 U.S.C. §1912(d) can be attempted. Such a placement when the family had only lived in the County for one month prior to removal, and when the mother has since returned home to Alaska, is insupportable.

The Court concludes that it is not in Teresa's best interest to be removed from her Montana foster home and returned "to an isolated community with which she never had previous contact." Again, the Bureau *Guidelines* discourage state courts from taking it upon themselves to dictate a child's ties with her Native community:

> It is recommended that in most cases state court judges not be called upon to determine whether or not a child's contacts with a reservation are so limited that a case should not be transferred.

> This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto over transfer to tribal court.

44 Fed. Reg. at 67591. Here the mother has joined in the motion for transfer, indicating a desire that her child be returned to her tribal home. While the Court attempts to discredit this decision, reciting Elizabeth's inability to care for and protect Teresa in the past, the Supreme Court of Montana is not in a position to second-guess this mother's decision for her child.

It is possible that Montana could apply a "best interest" test consistent with the ICWA. The "best interest" standard is not unheard of in jurisdictional statutes. Both the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. §1738A and the Uniform Child Custody Jurisdiction (UCCJA), 9 U.L.A. §3, allow a state court to exercise jurisdiction if in the best interest of the child. The PKPA and UCCJA, which are virtually identical, apply a best interest standard in two situations. First, the statutes allow for a best interest determination in cases where more than one forum may assert jurisdiction, but "best interest" is defined in concrete terms, going to the appropriateness of the forum:

> (c) A child custody determination made by a court of a State is consistent with the provisions of this section only if –
>
> (1) such court has jurisdiction under the law of such State; and
>
> . . . .
>
> (B)(i) it appears that no other State would have jurisdiction under subparagraph (A),

> and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

28 U.S.C. §1738A(C)(2)(B). Only when no other forum could exercise jurisdiction is the best interest standard left undefined, presumably because it is in a child's best interest that some court hear his case.

The "best interest" test used in the PKPA and UCCJA directs attention to what is in the child's best interest jurisdictionally, attempting to ascertain which of the available fora will best serve the child. Montana, conversely, uses its "best interest" standard to look to the ultimate result rather than confining its inquiry to jurisdictional matters. Allowing Montana courts to apply an undefined "best interest" standard as a jurisdictional test invites reliance on local bias and prejudice to defeat tribal jurisdiction, a situation the ICWA was meant to eradicate.

II. AVAILABILITY OF EVIDENCE IN MONTANA CANNOT JUSTIFY DENIAL OF TRANSFER IN THIS CASE

The revised opinion of the Montana Supreme Court holds that not only is transfer not in Teresa's best interest, but that the criteria of the Bureau *Guidelines* offer a basis for denial as well. The provision of the Bureau *Guidelines* relied upon by the Court suggest that transfer may be

denied if "the evidence necessary to decide the case could not be adequately presented to the court without undue hardship to the parties or the witnesses." 44 Fed. Reg. at 67591. In a tautological pronouncement, the Court holds that this criteria has been met because the evidence of the events giving rise to the action is present in Montana. Montana would have no claim to jurisdiction if this were not true and common rules of construction will not permit such a result. Any state court considering the custody of a non-reservation Indian child found within its borders could make this claim, and if permitted to do so, the exception would swallow the rule.

The Supreme Court's opinion gives no consideration to the alternative methods of securing and presenting evidence suggested by the *Guidelines*, 44 Fed. Reg. 67591 Concern for the hardship to Elizabeth, now living in Alaska, if the matter proceeds in Montana, is notably lacking.

The original decision of the Montana Supreme Court held that the trial court could deny transfer using the best interest test alone. Pet. App. at A25. The earlier opinion also makes clear that the Court's best interest determination derives from doubts the Court harbored about the sincerity of the Tribe's interest or about the Tribe's ability to adequately serve Teresa. The revised opinion is but a shallow attempt to lend some legitimacy to a decision permeated with bias.

CONCLUSION

The Montana Supreme Court has allowed its view of what is best for an Indian child to justify its assertion of jurisdiction and refusal to transfer this matter to the tribal court. The ICWA does not permit this type of decision-making. For the foregoing reasons, this Court should accept certiorari.

Respectfully submitted,

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